(21)

No. 04-277
Vide 04-281
Title: National Cable & Telecommunications Association, et al., Petitioners
v.
Brand X Internet Services, et al.
Docketed: August 31, 2004
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-71425, 02-72251)
Decision Date: October 6, 2003
Rehearing Denied: March 31, 2004
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Jun 17 2004	Application (03A1036) to extend the time to file a petition for a writ of certiorari from June 29, 2004 to July 29, 2004, submitted to Justice O'Connor.
Jun 18 2004	Application (03A1036) granted by Justice O'Connor extending the time to file until July 29, 2004.
Jul 19 2004	Application (03A1036) to extend further the time from July 29, 2004 to August 28, 2004, submitted to Justice O'Connor.
Jul 20 2004	Application (03A1036) granted by Justice O'Connor extending the time to file until August 30, 2004.
Aug 30 2004	Petition for a writ of certiorari filed. (Response due September 30, 2004)
Sep 17 2004	Waiver of right of respondent Focal Communications Corporation to respond filed.
Sep 20 2004	Brief of respondents BellSouth and SBC in support filed. VIDED.
Sep 20 2004	Brief of respondents Verizon Telephone Companies, et al. in support filed. VIDED.
Sep 30 2004	Brief of respondent EarthLink, Inc. in opposition filed. VIDED.
Sep 30 2004	Brief of respondents States and Consumer Groups in opposition filed. VIDED.
Sep 30 2004	Brief of respondents Brand X Internet Services and Center for Digital Democracy in opposition filed. VIDED.
Nov 16 2004	Reply of petitioners National Cable & Telecommunications Association, et al. filed.
Nov 17 2004	DISTRIBUTED for Conference of December 3, 2004.
Dec 3 2004	Petition GRANTED The case is consolidated with No. 04-281 and a total of one hour is allotted for oral argument.
Jan 7 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents. VIDED.
Jan 12 2005	Motion to dispense with printing the joint appendix filed by United States. VIDED
Jan 18 2005	Brief of Cable-Industry Petitioners filed. VIDED.
Jan 18 2005	Brief of respondents BellSouth and SBC in support filed. VIDED.
Jan 18 2005	Brief of respondents Verizon Telephone Companies, et al. in support filed. VIDED.
Jan 18 2005	Brief amicus curiae of Washington Legal Foundation filed. VIDED.
Jan 18 2005	Brief of petitioner Federal Communications Commission and the United States filed. VIDED.
Jan 18 2005	Brief amicus curiae of Telecommunications Industry Association filed. VIDED.
Jan 19 2005	SET FOR ARGUMENT ON Tuesday, March 29, 2005.
Jan 24 2005	Motion to dispense with printing the joint appendix filed by petitioner GRANTED.

Jan 28 2005	CIRCULATED.
Jan 31 2005	Motion for divided argument filed by Acting Solicitor General. VIDED
Feb 18 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the petitioners National Cable, et al.VIDED.
Feb 18 2005	Consent to the filing of amicus briefs in support of either party received from counsel for Local Government Respondents. VIDED.
Feb 18 2005	Consent to the filing of amicus briefs in support of either party received from counsel for the respondents BellSouth Corporation, et al. and Verizon Telephone Companies. VIDED.
Feb 18 2005	Brief amici curiae of AARP, Free Press, and Nationial Internet Alliance filed. VIDED. (Distributed)
Feb 22 2005	Brief of respondent MCI filed. VIDED. (Distributed)
Feb 22 2005	Brief of respondents EarthLink, Inc., Brand X Internet Services, and Center for Digital Democracy filed. VIDED. (Distributed)
Feb 22 2005	Brief of respondents States and Consumer Groups filed. VIDED. (Distributed)
Feb 22 2005	Brief amicus curiae of State of New Jersey, Board of Public Utilities filed. (Distributed)
Feb 22 2005	Brief amicus curiae of National Association of Regulatory Utility Commissioners filed. VIDED. (Distributed)
Feb 22 2005	Brief amici curiae of American Civil Liberties Union, et al. filed. VIDED. (Distributed)
Feb 28 2005	Motion for divided argument filed by petitioner GRANTED.
Mar 1 2005	Record received from U.S.C. A. 9th Circuit. (1 box)
Mar 1 2005	Record received from Chamber of Judge O'Scannlin - FCC record (2 boxes)
Mar 18 2005	Reply of petitioners Federal Communications Commission and the United States filed. VIDED. (Distributed)
Mar 20 2005	Reply of respondents Verizon Telephone Companies, et al. in support filed. VIDED. (Distributed)
Mar 22 2005	Reply of petitioners Cable-Industry petitioners filed. VIDED. (Distributed)
Mar 29 2005	Argued. For petitioners in 04-277: Paul T. Cappuccio, New York, N.Y. For petitioners in 04-281: Thomas G. Hunger, Deputy Solicitor General, Department of Justice, Washington, D.C. For respondents: Thomas C. Goldstein, Washington, D.C.

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether, under the framework set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the FCC was entitled to decide that, for purposes of regulation under the Communications Act, cable operators offering so-called "cable modem service" (high-speed Internet access over cable television systems) provide only an "information service" and not a "telecommunications service."

LIST OF PARTIES TO THE PROCEEDINGS AND CORPORATE DISCLOSURE STATEMENT

In the consolidated proceedings below, petitioners National Cable & Telecommunications Association ("NCTA"), Charter Communications, Inc., Cox Communications, Inc., Time Warner Inc., and Time Warner Cable Inc. were intervenors in support of the Federal Communications Commission and the United States. Also intervening in the proceedings below were AT&T Corp., Competitive Telecommunications Association, Focal Communications Corp., the Information Technology Association of America, SBC Communications, Inc., WorldCom, Inc., and the Vermont Public Service Board. In the court of appeals, the petitioners were Brand X Internet Services, Buckingham Township, the State of California, the Center for Digital Democracy, Conestoga Township, Consumer Federation of America, Consumers Union, Earthlink, Inc., East Hempfield Township, Martic Township, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, the National League of Cities, Providence Township, the Public Utilities Commission of the State of California, the Texas Coalition of Cities for Utilities Issues, Verizon Internet Solutions d/b/a Verizon.net, Verizon Telephone Companies, and the United States Conference of Mayors.

Pursuant to Rule 29.6 of the Rules of this Court, petitioners state as follows:

No publicly held company owns an interest of 10% or more in NCTA, Charter Communications, Inc., Cox Communications, Inc., or Time Warner Inc.

Time Warner Inc. and Comcast Corporation, both publicly held companies, each have an interest of 10% or more in Time Warner Cable Inc.

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On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

The National Cable & Telecommunications Association, Charter Communications, Inc., Cox Communications, Inc., Time Warner Inc., and Time Warner Cable Inc. respectfully petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

In this case, the Ninth Circuit refused to accord *Chevron* deference to the FCC's reasonable determination that broadband Internet access over cable television systems is solely an "information service" and not a "telecommunications service" under the Communications Act. The court of appeals did so not because it believed the agency's interpretation to be unreasonable, but because it

viewed that interpretation as inconsistent with a circuit precedent antedating the FCC's exercise of interpretive discretion, in which the court had held that cable modem service includes a "telecommunications service" component. According to the court of appeals, that precedent — rendered in a dispute to which the FCC was not a party — bound the court as a matter of *stare decisis*.

The deployment of broadband service is of central importance to the national economy. Whether cable modem service is solely an information service or also includes a telecommunications service has important regulatory consequences that may affect the deployment not only of cable modem service but also of other forms of broadband service. Congress intended questions of this nature to be decided by the FCC (subject only to deferential review), not by the Ninth Circuit. Because of the importance of the FCC's order and the court of appeals' refusal to defer, this Court should now grant certiorari and review the FCC's decision under the standard mandated by this Court's *Chevron* precedent.

Granting review would also afford the Court an opportunity to provide guidance to the lower courts concerning the question whether a court of appeals must accord *Chevron* deference to an agency decision that interprets ambiguous statutory language in a way that is reasonable but inconsistent with circuit precedent. That issue is the subject of a deep and persistent conflict of authority. Moreover, the Ninth Circuit's approach is wrong: there are strong reasons why, even if the precedent of this Court can provide a predicate for withholding *Chevron* deference, lower court precedent cannot. The Ninth Circuit's contrary view promotes circuit splits, undermines agencies' ability to make national policy, and unnecessarily generates appeals to this Court.

For all these reasons, the Court should grant this Petition.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals (Pet. App. 1a-36a) is reported at 345 F.3d 1120. The FCC's order (Pet. App. 37a-186a) is reported at 17 FCC Rcd 4798.

JURISDICTION

The court of appeals entered its judgment on October 6, 2003. Pet. App. 1a. The court of appeals denied petitions for rehearing and rehearing *en banc* on March 31, 2004. *Id.* at 187a. On June 18, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 29, 2004. On July 20, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 30, 2004. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of relevant provisions of the Communications Act of 1934, 47 U.S.C. §§ 153, 522, are reprinted at Pet. App. 189a-190a.

STATEMENT

1. This case is about regulation of high-speed access to the Internet. When consumers first began to use the Internet in the early 1990s, they generally did so over telephone "dial-up" connections, which were relatively slow.[1] In the ensuing years, cable television companies spent billions of dollars upgrading their systems to support "cable modem service," which is high-speed Internet ser-

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[1] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd 19287, ¶ 6 (2000) ("*Notice of Inquiry*").

vice provided over cable systems. Cable modem service enables consumers to use the Internet at speeds more than twenty times faster than dial-up. *See* Pet. App. 50a-51a. Cable modem service became widely available in the United States beginning around 1998; its growth since then has been explosive.[2]

With the rapid growth of cable modem service came controversy over its regulatory status — in particular, whether cable modem service constituted a "cable service," a "telecommunications service," or an "information service" under the Communications Act.[3] Important regulatory consequences depend on the resolution of this controversy: the FCC has said that, when a communications service constitutes an "information service," it is presumptively unregulated, whereas, when a service constitutes a "telecommunications service," it is presumptively subject to Title II of the Communications Act, 47 U.S.C. § 201, *et seq.*, which was adopted in 1934 to regulate monopoly telephone companies.[4]

2. Questions about cable modem service's regulatory status initially surfaced in disputes between cable operators and municipalities in connection with so-called "access" requirements. Pursuant to Title VI of the Communications Act, 47 U.S.C. § 521, *et seq.*, cable operators are required to enter into franchise agreements with local governments before they may provide cable service. *Id.* § 541(b)(1). Such franchises commonly require the local government's approval when a cable system's ownership changes hands. *See id.* § 537. Beginning in 1998, some local governments sought to condition transfer approvals in connection with cable mergers on a requirement that cable operators allow unaffiliated Internet Service Providers ("ISPs") the right to provide Internet access service over cable systems. A number of cable operators challenged such requirements in federal court.

One such challenge eventually resulted in the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (2000). In that case, AT&T, a cable operator, argued that, by conditioning transfer of ownership on an access requirement, the City of Portland, the local franchising authority, had violated Section 621(b)(3)(D) of the Communications Act, which prohibits local franchising authorities from "requir[ing] a cable operator to provide any telecommunications services or facilities." 47 U.S.C. § 541(b)(3)(D). According to AT&T, requiring a cable operator to provide access to ISPs would violate that provision by turning the cable operator's systems into "telecommunications facilities" for use by unaffiliated ISPs. In support, AT&T relied on the Act's definition of "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

Although both AT&T and Portland briefed the case on the understanding that cable modem service itself constituted a "cable service," the Ninth Circuit did not accept

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[2] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, Notice of Inquiry, 19 FCC Rcd 5136, Appendix A, Table 1 (2004) (counting 13.7 million subscribers in 2003).

[3] *See* 47 U.S.C. § 153(7) ("cable service"); *id.* § 153(20) ("information service"); *id.* § 153(46) ("telecommunications service").

[4] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 32 (1998) ("*Report to Congress*") ("The Act imposes no regulatory obligations on information service providers as such."); *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, ¶ 6 (2004) ("[T]elecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services.").

that assumption. According to the court, "[b]ecause Portland premised its open access condition on its position that [cable modem service] is a 'cable service' governed by the franchise, we begin with the question of whether [cable modem service] truly is a 'cable service' as Congress defined it in the Communications Act." 216 F.3d at 876. The court noted at the outset that, because the FCC had not yet addressed the issue, the court was "not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Id.* In the end, the court determined that cable modem service was not a "cable service," which, according to the court, meant that the local franchising authority "may not directly regulate [cable modem service] through its franchising authority." *Id.* at 877.

One might have thought that, if the court's consideration of the "cable service" question was relevant, it was also dispositive. But the Ninth Circuit thought otherwise: it went on to address whether Portland's access requirement violated Section 621(b)(3) by asking whether Portland "may condition AT&T's provision of standard cable service upon its opening access to the cable broadband network for competing ISPs." *Id.* In connection with that question, the court analyzed the nature of cable modem service and concluded:

> [Cable modem service] consists of two elements: a "pipeline" (cable broadband instead of telephone lines) and the Internet service transmitted through that pipeline. However, unlike other ISPs, [AT&T] controls all of the transmission facilities between its subscribers and the Internet. To the extent [AT&T] is a conventional ISP, its activities are that of an information service. However, to the extent that [AT&T] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

Id. at 878.

Having determined that cable modem service contained a "telecommunications service" component, the court resolved that, "under the several provisions of [47 U.S.C.] § 541(b)(3), Portland may not regulate AT&T's provision of [cable modem service] in its capacity as a franchising authority." 216 F.3d at 879. The Ninth Circuit apparently relied primarily on Subsection (b)(3)(B), 47 U.S.C. § 541(b)(3)(B), which provides that local franchising authorities "may not impose any requirement . . . that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator . . . ." 216 F.3d at 879; *see also* Pet. App. 14a. The court concluded by suggesting, however, that, although the Communications Act prohibited local franchising authorities from imposing an access requirement, the Act itself might impose such a requirement. *See* 216 F.3d at 879 ("Under the Communications Act, [the] principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, 'regardless of the facilities used.' 47 U.S.C. § 153(46).").

3. In a subsequent case, the United States District Court for the Eastern District of Virginia likewise viewed a similar access requirement as unlawful. *See MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000). Contrary to the Ninth Circuit, however, the district court held that cable modem service constituted a "cable service." *Id.* at 715. For that reason, the court held that the access requirement violated Section 621(c), which provides that cable operators may not be

made "subject to regulation as a common carrier . . . by reason of providing any cable service." 47 U.S.C. § 541(c). According to the court, the access requirement constituted prohibited "common carrier regulation . . . by reason of" the cable operator's provision of cable modem service in that it forced the cable operator to allow unaffiliated ISPs common-carrier-like access to cable systems. 97 F. Supp. 2d at 715.

On appeal, the Fourth Circuit affirmed, but only on the ground argued by the cable operator in the *Portland* case: that access requirements would force the provision of "telecommunications facilities" in violation of Section 621(b)(3)(D). *MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 363-64 (4th Cir. 2001). As the court noted, "[s]ome of the parties want us to go further . . . and determine the specific regulatory classification of" cable modem service, which the court found to be "complex and subject to considerable debate." *Id.* at 364, 365. The court further noted that "the outcome" of that debate would "have a marked effect on the provision of Internet services," *id.* at 365, including possible "common carrier obligations" in the case of a "telecommunications service" classification and freedom from "local franchising or common carrier regulation" in the case of an "information service" classification, *id.* at 364. But, because the court found the access requirement to violate Section 621(b)(3)(D), it was "content to leave [classification] issues to the expertise of the FCC." *Id.* at 365.

The question of cable modem service's proper classification also arose in an FCC rulemaking regarding the rates that utilities may charge cable operators for attaching wires to utility poles. Section 224(b)(1) of the Communications Act directs the FCC to "regulate the rates, terms, and conditions for pole attachments." 47 U.S.C. § 224(b)(1). The statute provides two distinct methodologies for calculating rates: attachments "used by a cable television system solely to provide cable service" are subject to one rate, *id.* § 224(d)(3), while attachments "used by telecommunications carriers to provide telecommunications services" are subject to a different, usually higher, rate, *id.* § 224(e)(1). In a rulemaking implementing Section 224, utilities argued that the FCC lacked ratemaking authority if cable modem service constituted an "information service," and that, if cable modem service constituted a "telecommunications service," the FCC was required to subject cable operators' pole attachments to the telecommunications rate.

The FCC rejected both arguments, and held that it could regulate the rates for attachments by cable systems providing cable modem service without deciding "the precise category into which Internet services fit." *Implementation of Section 703(e) of the Telecommunications Act of 1996*, Report and Order, 13 FCC Rcd 6777, ¶ 34 (1998). According to the FCC, it had general jurisdiction under Section 224(b) even with respect to services other than those specified in Section 224(d) and (e). *See id.* ¶¶ 30-31. Moreover, the FCC determined that, within that general jurisdiction, it had "discretion" to set an appropriate rate. *See id.* ¶ 34. With respect to commingled cable-television/cable-modem service, the agency decided to exercise that discretion by setting a rate equal to the rate of Section 224(d). *Id.* ¶ 34.

In review proceedings that were consolidated before the Eleventh Circuit, however, a group of electric utilities persuaded the court that the FCC lacked authority to regulate pole attachment rates for cable systems providing cable modem service. *See Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000). According to the court, the separate rate formulas of Sections 224(d) and (e) implied that, "[f]or the FCC to be able to regulate the

rent for an attachment that provides Internet service . . . , Internet service must qualify as either a cable service or a telecommunications service." *Id.* at 1276. The court concluded that cable modem service was an information service (and not a cable service or a telecommunications service), *id.* at 1276-77, which, according to the court, meant that the FCC lacked ratemaking authority, *id.* at 1278.

This Court reversed, holding that the FCC had regulatory authority regardless of how cable modem service was classified. *See National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002). This was so, the Court explained, because the statute defined "pole attachments" as "'*any* attachment by a cable television system.'" *Id.* at 333 (quoting 47 U.S.C. § 224(a)(4)) (emphasis added). The Court "note[d] that the FCC, subsequent to the order under review, has reiterated that it has not yet categorized [cable modem] service." *Id.* at 338. And, although the Court was well aware of the *Portland* decision, *see id.* at 350 n.2 (Thomas, J., concurring in part and dissenting in part), the Court gave no hint that *Portland* disposed of the issue. To the contrary, the Court stated that it could not "fault the FCC" for leaving the "hard" question of cable modem service's classification to a separate proceeding. *Id.* at 338.

4. Recognizing the need for "a national legal and policy framework," the FCC opened a rulemaking proceeding in September 2000 (before some, but not all, of the decisions described above) with the goal of determining "what regulatory treatment, if any, should be accorded to cable modem service." *Notice of Inquiry* ¶¶ 1, 2. The agency received over 250 written submissions and conducted numerous meetings with industry, government, and consumer advocates. *See* Pet. App. 42a-43a. Then, on March 15, 2002 (after each of the judicial decisions described above had issued), the FCC released the order under review.

In that order, the FCC determined that "[t]he Communications Act does not clearly indicate how cable modem service should be classified or regulated" and that "the relevant statutory provisions do not yield easy or obvious answers to the questions at hand." *Id.* at 82a. In such circumstances, the FCC noted, "'agencies have authority to fill gaps where statutes are silent.'" *Id.* at 83a (quoting this Court's decision in *Gulf Power*). Based on its reading of the Act, its previous classification of Internet access service, and its belief that "broadband services should exist in a minimal regulatory environment," *id.* at 44a (internal quotation marks omitted), the FCC determined that "cable modem service as currently provided is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs," *id.* at 83a.

The FCC reached this outcome by taking account of "the nature of the functions that the end user is offered." *Id.* at 88a-89a. Cable modem service, the FCC noted, offered the same functions as dial-up Internet access — including "[e]-mail, newsgroups, [and] the ability for the user to create a web page that is accessible by other Internet users" — except at higher speeds. *Id.* at 88a. Thus, the FCC found that "cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications." *Id.* at 89a. As such, the FCC held, cable modem service, like dial-up Internet access, met the Act's definition of an "information service." *Id.* at 90a.

The FCC rejected the argument advanced by some ISPs — in apparent pursuit of a federal access requirement — that cable modem service "include[s] an offering of telecommunications service to subscribers." *Id.* The FCC distinguished between "telecommunications," which the Act defines as transmission of information selected by the user, and "telecommunications service," which the Act defines as the offering of telecommunications to the public for a fee. *Id.* at 91a. The FCC acknowledged that cable modem service includes a "telecommunications" component: by definition, any "information service" is provided "via telecommunications." *See id.* But the agency held that, unless a cable operator provides "a stand-alone offering of transmission for a fee directly to the public," there can be no "telecommunications service." *Id.* at 92a. "The cable operator providing cable modem service," the FCC concluded, "is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service." *Id.* at 92a-93a.

The FCC acknowledged that, in the *Portland* decision, the Ninth Circuit had stated that cable modem service contains a separate offering of telecommunications service to subscribers. *Id.* at 108a. But the agency noted that the court had done so in "consider[ing] a much narrower issue — whether a local franchising authority . . . had the authority to condition its approval of a cable operator's merger on the operator's grant of multiple ISP access." *Id.* And, the FCC pointed out, "[t]he Ninth Circuit's decision was based on a record that was less than comprehensive." *Id.* at 109a. Moreover, the FCC noted, the parties in *Portland* "did not brief the regulatory classification issue." *Id.* Finally, the agency observed, "[t]he Ninth Circuit could have resolved the narrow question before it by finding that cable modem service is not a cable service." *Id.* at 110a.

In any event, the FCC disagreed with the Ninth Circuit's assessment. As the agency explained:

> [The Ninth Circuit] concluded that because there is a "telecommunications" component involved in providing cable modem service, a separate "telecommunications service" is also being offered within the meaning of section 3(46) of the Act. As discussed . . . above, however, under the Act telecommunications is distinct from telecommunications service. Though by definition an information service includes a telecommunications component, the mere existence of such a component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber.

Id. (footnotes omitted).

5. Numerous parties sought judicial review pursuant to the Hobbs Act, *see* 47 U.S.C. § 402(a); 28 U.S.C. § 2341, *et seq.*: in all, seven petitions for review were filed in the Third, Ninth, and D.C. circuits. *See* Pet. App. at 8a. There were three categories of petitioners: (1) groups of ISPs, state governments, and consumers arguing that cable modem service includes a separate offering of "telecommunications service" (apparently in pursuit of access obligations); (2) groups of local franchising authorities advocating a "cable service" classification (apparently because the Act grants local governments certain regulatory powers with respect to "cable services," including the power to extract franchise fees on revenues derived from such services, 47 U.S.C. § 542(b)); and (3) Verizon, a provider of high-speed Internet access using Digital Subscriber Line ("DSL") technology over telephone lines, which supported the FCC's "information

service" classification for cable modem service but argued that the agency should have immediately extended it to DSL service. *See* Pet. App. at 9a. Pursuant to the random selection procedure specified in 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation consolidated all petitions in the Ninth Circuit. *See* Pet. App. at 9a. NCTA, Charter, Cox, and Time Warner intervened and filed a joint brief in support of the FCC.

In a *per curiam* opinion, a panel of the Ninth Circuit affirmed in part and vacated in part. *Id.* at 19a. The court began its analysis by observing that, "[n]ormally, when we review an agency's interpretation of the statute it is charged with administering, we apply the two-step formula set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*" *Id.* at 9a-10a (citation omitted). The court went on to hold, however, that, in light of the prior *Portland* decision, it could not follow the *Chevron* framework in this case. Because "three-judge panels are bound by the holdings of earlier three-judge panels," the court reasoned, "*Portland*'s construction of the Communications Act remains binding precedent within this circuit, even in light of the FCC's contrary interpretation of the statute." *Id.* at 15a, 17a.

The court of appeals found support for its result in *Neal v. United States*, 516 U.S. 284 (1996), in which this Court stated that, "'[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.'" Pet. App. 18a (quoting *Neal*, 516 U.S. at 295). "Notwithstanding the Supreme Court's use of the term 'we,'" the court of appeals stated, "there is nothing to suggest that *Neal*'s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone." Pet. App. 18a.

Having concluded that it was required to adhere to *Portland*, the panel viewed its analysis as being at an end. "Because the Commission's Declaratory Ruling agreed with our conclusion [in *Portland*] that cable broadband service is not 'cable service,' but disagreed with our conclusion that it is in part 'telecommunications service,'" the court affirmed in part, vacated in part, and remanded for further proceedings. *Id.* at 19a. Saying that "the various petitioners' claims all revolve around the FCC's central classification decision," the court "decline[d] . . . to consider their remaining claims . . . , leaving them for reconsideration by the FCC on remand." *Id.* at 19a-20a n.14.

In a separate concurrence, Judge O'Scannlain agreed that the Ninth Circuit's *stare decisis* precedents required the panel to follow *Portland*, but criticized those precedents as "produc[ing] a result strikingly inconsistent with *Chevron*'s underlying principles." *Id.* at 20a (internal quotation marks and citation omitted). *Stare decisis*, Judge O'Scannlain noted, ordinarily serves as a "check on judicial power," but "adherence to *stare decisis* in the present case — coming as it does in a decision that determines the outcome of seven different petitions for review from three different circuits consolidated and assigned randomly to this court by the Judicial Panel on Multidistrict Litigation — appears to aggrandize, rather than limit our power over an admittedly complicated and highly technical area of telecommunications law." *Id.* at 21a. "Regardless of one's view of the wisdom of the FCC's declaratory ruling," Judge O'Scannlain concluded, "it cannot be denied that our holding today effectively stops a vitally important policy debate in its tracks, at least until

the Supreme Court reverses us or Congress decides to act." *Id.*

Judge Thomas, the author of the *Portland* opinion, also concurred separately. In his view, the case before the court did not "implicat[e] *Chevron* deference, not only for the reasons noted in [the court's] unanimous opinion, but also because [the classification question] is a question of pure statutory interpretation." *Id.* at 23a. Regardless, Judge Thomas believed that "the statutory definitions, combined with the overall regulatory and legislative context, compel the result that cable modem service includes a telecommunications service component." *Id.* at 36a. Thus, Judge Thomas stated, "even if we were writing on a clean slate, my conclusion would be the same as the one we reached in *City of Portland* as to the meaning of the statute." *Id.*

6. The FCC and the cable intervenors filed separate petitions for rehearing *en banc*, arguing that, because the *en banc* court would not be bound by *Portland*, it could consider the merits of the FCC's ruling under the appropriate *Chevron* framework. The court denied the petitions without comment. *See id.* at 188a. In response to applications by the FCC, the United States, and the cable intervenors, the court subsequently stayed its mandate pending the filing of a petition for certiorari.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD REVIEW THE FCC'S DECISION — A CRUCIAL ORDER DETERMINING THE REGULATORY FRAMEWORK FOR VITALLY IMPORTANT COMMUNICATIONS SERVICES — UNDER THE PROPERLY APPLICABLE *CHEVRON* STANDARD.

A. Further Review Is Warranted By the Exceptional Importance of Broadband Service and the FCC's Decision Concerning Its Regulation.

This case centers on the regulatory status of a communications service that is of vital importance: broadband Internet access service. The enormous stakes — not just for the parties, but for the Nation at large — justify review by this Court at this time.

In the Telecommunications Act of 1996, Congress proclaimed it "the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media," 47 U.S.C. § 230(b)(1), and further specified that "[a]dvanced telecommunications and information services should be provided in all regions of the Nation," *id.* § 254(b)(2). Since then, the FCC has noted that "[t]he widespread deployment of broadband infrastructure has become the central communications policy objective of the day. It is widely believed that ubiquitous broadband deployment will bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public."[5]

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[5] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019, ¶ 1 (2002) ("*Wireline Broadband NPRM*") (footnotes omit-

The FCC's view has bipartisan political support.[6]

The FCC decision that the court of appeals vacated could not be more pivotal to the future of not only cable modem service but also all other forms of broadband.[7] Adopted after careful scrutiny of hundreds of submissions by commenting parties, close consideration of the nature of the functions cable modem service offers to end users, and a painstaking review of the statutory language and the agency's prior decisions, the FCC's order erects the

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ted); *see also Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Report and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 212 (2003) ("development of broadband infrastructure . . . is vital to the long-term growth of our economy as well as our country's continued preeminence as the global leader in information and telecommunications technologies"); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, ¶ 3 (2004) ("we have recognized the paramount importance of encouraging deployment of broadband infrastructure to the American people") (footnote omitted).

[6] *See* President George W. Bush, Remarks at the U.S. Department of Commerce (June 24, 2004), *available at* http://www.whitehouse.gov/news/releases/2004/06/20040624-7.html ("What we're interested in is to make sure broadband technology is available in every corner of America by the year 2007. . . . Broadband, or what they call high-speed Internet, is critical in making our high-speed economy even more productive."); Senator John Kerry, Remarks in San Jose, California (June 24, 2004), *available at* http://www.johnkerry.com/pressroom/speeches/spc_2004_0624.html ("[W]e need to seize the possibilities of the Broadband Revolution and make Internet access available to all of America's families. . . . This means connecting every corner of our country to a network that's up to 100 times faster than today's.").

[7] The FCC has expressed an intent "to develop an analytical framework that is consistent, to the extent possible, across multiple platforms," including cable, telephone, terrestrial wireless, and satellite facilities. *Wireline Broadband NPRM* ¶ 6; *see* Pet. App. 44a, 129a.

framework for the agency's regulatory approach to broadband service. The resulting "information service" classification, also "guided" by the FCC's belief that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market," Pet. App. 43a, 44a (internal quotation marks omitted), constitutes the very cornerpost of that framework.

The court of appeals' decision upends that framework. By concluding that cable modem service is "in part 'telecommunications service,'" *id.* at 19a, the court held that cable modem service — and by extension every other broadband service — may be subjected to the kind of common carrier regulation that was crafted for monopoly telephone service providers and that is therefore altogether unsuitable for a service that is subject to intense competition. Such an outcome may stifle investment in broadband infrastructure, innovation, and deployment. Any such effect would contravene federal communications policy and would profoundly impact the lives of millions of people across the United States. That possibility alone is ample justification for review in this Court.

B. Further Review Is Especially Warranted Because the Court of Appeals Failed To Extend *Chevron* Deference.

Further warrant for review is supplied by the court of appeals' refusal to extend *Chevron* deference. That refusal determined the outcome: under the *Chevron* framework, the FCC's order would readily have passed muster.

As the FCC pointed out, there cannot be a "telecommunications service" unless there is an "*offering* of telecommunications . . . *directly* to the public." 47 U.S.C. § 153(46) (emphasis added). The FCC reasonably determined that this requirement is satisfied only when there is

"a stand-alone offering of transmission for a fee directly to the public," and not where there is "a single, integrated service." Pet. App. 90a, 92a. As the FCC explained, "[t]he cable operator providing cable modem service over its own facilities . . . is not offering telecommunications service to the end user, but rather is merely using telecommunications" to provide end users with an "information service." *Id.* at 92a-93a. That interpretation of the words "offering . . . directly" was reasonable — just as it is reasonable to say that a baker does not offer flour directly to buyers of bread.

The FCC's reading also finds strong support in the statute's structure. A provider of an "information service" by definition provides it "via telecommunications." 47 U.S.C. § 153(20). "Telecommunications" is defined as "the transmission . . . of information . . . without change in the form or content of the information as sent and received." *Id.* § 153(43). As the FCC held in a prior order, all providers of "information service" necessarily change the form and content of information sent and received. *See Report to Congress* ¶¶ 39-41. Thus, the statute strongly implies that a service cannot be an "information service" and a "telecommunications service" simultaneously. *See id.* ¶ 41; *see also* Pet. App. 92a nn. 160-61 (relying on *Report to Congress*'s analysis).

In sum, the FCC's was a reasonable interpretation of statutory language that does not unambiguously resolve the precise question presented — as illustrated by the differing interpretations that courts had given the language prior to the FCC's interpretation in the order at issue.[8] If

[8] *See supra*, pp. 5-10; *cf. Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 739 (1996) ("In light of the two dissents from the opinion of the Supreme Court of California, . . . and in light of the opinion of the Supreme Court of New Jersey creating the conflict that has prompted us to take this case, it would be difficult indeed to contend that the word 'interest' in the National Bank Act is unambiguous with regard to the point at issue here.") (footnote omitted).

the lottery had assigned this appeal to any circuit other than the Ninth, then, the FCC's decision would have been upheld. Yet, the Ninth Circuit refused to extend *Chevron* deference and vacated. Because it did so in a case under the Hobbs Act, 28 U.S.C. § 2341, *et seq.*, the classification question cannot be relitigated in other circuits.[9] Congress mandated that, subject only to deferential review, national communications policy be made by the FCC — not by the Ninth Circuit. This Court should therefore grant certiorari and review the FCC's decision under the *Chevron* standard.[10]

[9] *See, e.g., US West Communications v. MFS Intelenet, Inc.*, 193 F.3d 1112, 1120, 1123 (9th Cir. 1999).

[10] Below, Brand X argued that this Court must affirm the Ninth Circuit's result unless it finds that the court of appeals misapplied *stare decisis* principles prevailing in the Ninth Circuit. *See* Response of Petitioner Brand X Internet Servs. in Opp. to Motions for Stay of Mandate Submitted by the FCC and Cable Intervenors at 7, *Brand X Internet Servs. v. FCC*, No. 02-70518, *et al.* (9th Cir. filed Apr. 7, 2004). Brand X is wrong: this Court is not bound, in reviewing agency action, to follow decisions of courts of appeals. *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 428-31 (1999) (reversing decision in which court of appeals had refused to defer to agency's decision whose analysis contravened circuit precedent); *Chevron*, 467 U.S. at 841-42 (criticizing court of appeals for setting aside EPA order as contrary to "two of [the court of appeals'] precedents," explaining that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition"); Richard J. Pierce, Jr., I *Administrative Law* § 3.6, at 185 (4th ed. 2002) ("The [Supreme] Court . . . frequently overrules circuit court precedents and upholds agency constructions that are inconsistent with circuit court precedents. . . . It has also criticized a circuit court for applying a circuit precedent, rather than conferring *Chevron*

C. Further Review Would Enable the Court To Resolve a Conflict of Authority Concerning *Stare Decisis* Principles.

Although this Court could resolve the question presented in this petition without evaluating the court of appeals' *stare decisis* reasoning, a grant of review would hold out the additional advantage of affording the Court an opportunity to resolve a conflict of authority concerning the question whether a court of appeals may decline to accord *Chevron* deference to an agency's reasonable interpretation of ambiguous statutory language where a circuit precedent antedating the agency's decision interpreted that language differently.

1. "[T]he circuit courts are split with regard to whether *Chevron* deference authorizes agencies to depart from independent judicial interpretations of agency statutes." Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 Admin. L. Rev. 1, 31 (2004); *accord* Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2253 (1997) ("The circuits that have considered the issue have split on what rule to adopt.").

The Second, Third, Eleventh, and D.C. Circuits would have decided the instant case differently than did the Ninth Circuit: in similar circumstances, those courts have held that a court of appeals may *not* withhold *Chevron* deference from an agency's reasonable interpretation of ambiguous statutory language. Some panels of these courts have simply held that, in such cases, *stare decisis*

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deference on an agency construction that conflicted with the circuit precedent.").

must yield.[11] Other panels have held that, in such circumstances, a court of appeals should formally overrule its prior precedent — not because it is wrong but because it is inconsistent with the agency's decision.[12]

By contrast, the Ninth Circuit held in the decision under review that a court of appeals may (indeed, must) withhold *Chevron* deference from an agency's interpretation of ambiguous statutory language where circuit precedent antedating the agency's decision interpreted the same

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[11] *See Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993) (Winter, J.) ("New regulations at variance with prior judicial precedents are upheld unless they exceeded the Secretary's authority or are arbitrary and capricious.") (internal quotation marks and brackets omitted); *United States v. Joshua*, 976 F.2d 844, 855 (3rd Cir. 1992) ("Where a prior panel of this court has interpreted an ambiguous statute in one way, and the responsible administrative agency later resolves the ambiguity another way, this court is not bound to close its eyes to the new source of enlightenment. In addition to securing the expertise of the agency, this approach tends to promote uniformity in the application of the statute."); *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3rd Cir. 1996) (same, quoting *Joshua*); *Satellite Broad. & Communications Ass'n v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994) ("Because we did not address the 'clear meaning' of [the statute] in [our prior precedent], this circuit is not precluded from revisiting our initial interpretation of the regulatory scheme in [our prior precedent]."); *Heimmermann v. First Union Mortgage Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002) ("Courts generally must defer to an agency statutory interpretation that is at odds with circuit precedent, so long as the agency's answer is based on a permissible construction of the statute.") (internal quotation marks omitted).

[12] *See Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir.1996) (Newman, J.) ("We have concluded that the interests of nationwide uniformity outweigh our adherence to Circuit precedent in this instance. . . . Accordingly, we have sought and obtained the concurrence of the [prior] panel to abandon that precedent . . . ."); *Chemical Waste Mgmt., Inc. v. EPA*, 873 F.2d 1477, 1482 n.* (D.C. Cir. 1989) (Ginsburg, C.J.) ("[o]ur discussion rejecting [prior circuit precedent] has been separately circulated to and approved by the entire court").

statutory language differently. The Ninth Circuit is joined in this view by the Fourth, Eighth, and Federal Circuits.[13]

2. In *Neal*, this Court stated: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." 516 U.S. at 295. According to the Ninth Circuit, "there is nothing to suggest that *Neal*'s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question." Pet. App. 18a. But, as explained below, there are in fact pressing reasons for limiting *Neal* that way.

This Court first addressed the interplay between *Chevron*'s deference doctrine and *stare decisis* principles in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The Court there stated: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning." *Id.* at 131.[14] Thus, the Court appeared to reconcile *Chevron* and *stare decisis* by holding that agencies remain free to

[13] *See Industrial TurnAround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) ("We are precluded from adopting [the agency's interpretation] as the law of the Circuit because it stands in conflict with . . . a prior panel opinion of this court."); *BPS Guard Servs., Inc. v. NLRB*, 942 F.2d 519, 523 (8th Cir. 1991) ("*Chevron* does not stand for the proposition that administrative agencies may reject, with impunity, the controlling precedent of a superior judicial body."); *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1375-76 (Fed. Cir. 2000) (reasons for adhering to judicial precedent articulated in *Neal* "apply equally to decisions rendered by circuit courts of appeal").

[14] The same language is contained in the Court's opinion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992).

exercise their interpretive discretion so long as they do not run afoul of a prior precedent determining the statute's "clear meaning" — *i.e.*, reflecting a *Chevron* "step one" determination.[15]

In *Neal v. United States*, 516 U.S. 284 (1996), however, the Court appeared to extend the *Maislin* rule. Although nothing appeared to turn on the point, the *Neal* Court stated: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." *Id.* at 295. By omitting the word "clear" from the *Maislin* formulation, the Court arguably suggested that even precedent not reflecting a "step one" determination divests agencies of *Chevron* discretion. The Court did not explain why such an extension might be appropriate, and the issue had not been briefed.[16]

Commentators have criticized *Neal*'s *dictum* as incompatible with *Chevron*'s principle that statutory silence or ambiguity signals a delegation of decision-making author-

[15] The prior precedents at issue in *Maislin* antedated *Chevron*. It has been suggested that the Court should — largely for reasons of practicality — "adopt a blanket presumption that all pre-*Chevron* precedent is step-one precedent." Thomas W. Merill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 917 (2001); *see also Alexander v. Sandoval*, 532 U.S. 275, 281 n.1 (2001) (noting "the settled principle that decisions . . . declaring the meaning of statutes prior to *Chevron* need not be reconsidered after *Chevron*").

[16] Of the briefs in *Neal*, only the Solicitor General's had cited *Maislin*, and then only in support of an argument that *stare decisis* required adherence to precedent that had established the statute's "clear meaning." Brief for the United States at 33, *Neal v. United States*, No. 94-9088 (U.S. filed Oct. 20, 1995).

ity to the responsible agency.[17] They have further pointed out that *Neal*'s *dictum* encourages regulated parties to race to the courthouse in the hopes of obtaining an interpretation by a court of their choosing before the agency has a chance to embody its interpretation of the statute in a *Chevron*-deference-eligible format.[18]

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[17] *See, e.g.*, Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 Admin. L. Rev. 173, 192 (2002) (allowing *stare decisis* to prevail over deference is "strikingly inconsistent with *Chevron*'s underlying principles"); Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1319 (2002) ("Denying agencies policymaking power when the judiciary rules on an issue first freezes in place decisions made by an institution with an avowedly inferior ability to assess social conditions and without the constitutional capacity to make political choices.") (footnote omitted); Merrill & Hickman, 89 Geo. L.J. at 916 ("If Congress has indeed delegated the primary power of interpretation to the agency rather than the courts, then it cannot be true that every judicial interpretation takes precedence over contrary agency interpretations. At least if the issue is one as to which the statute admits of more than one meaning, then the agency interpretation logically should take precedence over the judicial interpretation."); Pierce, 85 Geo. L.J. at 2258 (*Neal*'s *dictum* "attach[es] too little significance to the values that are furthered by *Chevron* and by administrative stare decisis, and attach[es] undue significance to the values that are furthered by judicial stare decisis.").

[18] *See, e.g.*, Bamberger, 77 N.Y.U. L. Rev. at 1274 (2002) ("Determining regulatory policy by means of such a winner-takes-all race to the courtroom undermines the logic of the administrative state, a logic that delegates flexible decisionmaking power to expert administrators."); Murphy, 56 Admin. L. Rev. at 25 ("Even to state this conclusion is to condemn it — it seems absurd to suggest that Congress intended to make allocation of primary control over construction of agency organic statutes turn on a race between agencies and courts."); Weaver, 54 Admin. L. Rev. at 194 ("[R]egulated entities may obtain a significant advantage by launching a 'first strike' that

3. Even assuming that *Neal*'s *dictum* should apply to the precedent of this Court, it should not be extended.[19] There are strong reasons why the deference-inhibiting effect that the *Neal dictum* would bestow on the precedent of this Court should not be imparted to the precedent of lower courts.[20]

First, extending the *Neal dictum* to lower court precedent impedes uniformity among the circuits. As the Eleventh Circuit has put it, having circuit precedent trump an agency interpretation "would wed [one] circuit to [its prior precedent], while all other circuits and the Supreme Court would be bound under *Chevron* to defer to the [agency] rule."[21] In contrast, "[d]eference to the agency's view permits a nationally uniform rule without the need for the Supreme Court to essay the meaning of every debatable [statute]."[22] Unless this Court intervenes, *Neal*-

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deprives the agency of Chevron deference. The net result may be a significant increase in interpretive litigation.").

[19] *Cf., e.g., Bedroc Ltd. v. United States*, 124 S. Ct. 1587, 1593 (2004) ("[W]e decline to overrule our recent precedent. By the same token, we will not extend [it].").

[20] *See* Pierce, I *Administrative Law* § 3.6, at 185 ("[D]ifferential treatment of Supreme Court and circuit court precedents is defensible. It reflects both a recognition of the value of obtaining consistent constructions of national statutes and the unique value of stare decisis at the Supreme Court level."); *Bankers Trust*, 225 F.3d at 1376 (noting Government's position that "[d]ecisions of the Supreme Court are an exception").

[21] *Oman*, 17 F.3d at 348; *see also* Bamberger, 77 N.Y.U. L. Rev. at 1304 ("[s]uch disharmony fosters circuit splits across the substantive range of regulatory policy"); *Bankers Trust*, 225 F.3d at 1376 ("We recognize that [adhering to circuit precedent] has the effect of creating inconsistency with the outcomes in the parallel cases of the Seventh and Eighth Circuits, discussed above.").

[22] *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) (Easterbrook, J.).

induced circuit splits will become only more widespread in the wake of *United States v. Mead Corp.*, 533 U.S. 218 (2001). Because *Mead* restricts the universe of agency decisions eligible for *Chevron* deference, *Portland*-type court of appeals decisions (interpreting ambiguous statutory terms *de novo* despite the possibility of a later *Chevron*-deference-eligible agency decision) will occur with even greater regularity. *See* Pet. App. 22a n.3 (O'Scannlain, J., concurring).

Second, extending *Neal*'s *dictum* places administrative agencies in an untenable position. Before an agency has a chance to conclude a notice-and-comment rulemaking, courts may reach conflicting decisions. *See supra*, pp. 5-10. Because obeying each conflicting decision is impossible, the agency must choose between flouting one or more courts' holdings and hoping for a lucky lottery draw, on the one hand, or ceasing national policy formation altogether, on the other hand. If the agency chooses the latter option, it will "find itself treating similarly situated parties quite differently (and thus unfairly) depending on accidents of geography."[23] Such Balkanization is inconsistent with the very notion of agencies' nationwide regulatory jurisdiction. It is also inconsistent with the understanding that this Court expressed in *Gulf Power* — that, even after *Portland*, the FCC retained *Chevron* discretion in classifying cable modem service. *See Gulf Power*, 534 U.S. at 338.

[23] Murphy, 56 Admin. L. Rev. at 12; *see Aguirre*, 79 F.3d at 317 (2d Cir.1996) (applying *Neal* rule would be contrary to "our frequently expressed concern to avoid disparate treatment of similarly situated aliens under the immigration laws"); *Schisler*, 3 F.3d at 568 ("Any other conclusion would result in . . . chaos . . . ."); Pierce, 85 Geo. L.J. at 2243 ("When a circuit court chooses to adhere to a circuit precedent instead of deferring to an agency's reasonable interpretation of ambiguous statutory language, it risks creating a legal environment characterized by unintentional, irrational discrimination.").

Finally, extending *Neal*'s *dictum* to lower court precedent would unnecessarily generate appeals to this Court in cases, like that here, in which the statute is ambiguous, in which the agency's interpretation is reasonable, and in which the outcome is therefore a foregone conclusion. Because this Court is not bound by circuit precedent, *see supra*, pp. 21-22 n.10, a court of appeals applying *Neal*'s *dictum* to circuit precedent in such cases would feel compelled to reach a result that it knows for a legal certainty will be contrary to the result that will be reached by this Court. When the law compels a court to commit error, something is amiss. We submit that it is, if not the *Neal dictum* itself, then at least its extension to lower court precedent.

CONCLUSION

The petition for a writ of certiorari should be granted.

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August 30, 2004

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRAND X INTERNET SERVICES,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION
Respondent.

[and consolidated cases]

[Nos. 02-70518, 02-70684, 02-70685, 02-70686, 02-70879, 02-71425 and 02-72251.]

Argued and Submitted: May 8, 2003
Filed: October 6, 2003

Before Richard D. Cudahy,* Diarmuid F. O'Scannlain, and Sidney R. Thomas, Circuit Judges.

Per Curiam Opinion; Concurrence by Judge O'Scannlain; Concurrence by Judge Thomas.

OPINION

PER CURIAM:

We must decide whether our prior interpretation of the Telecommunications Act controls review of the Federal

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* The Honorable Richard D. Cudahy, Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

Communications Commission's decision to classify Internet service provided by cable companies exclusively as an interstate "information service."

I

Over half of the households in the United States have Internet connections. *See* U.S. Dept. of Commerce, *A Nation Online: How Americans Are Expanding Their Use of the Internet* at 2 (Feb. 2002), *available at* http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf (hereinafter "*A Nation Online*").[1] Approximately 80 percent of those connections are "dial-up" connections. Such connections use the wires owned by local telephone companies to connect the user's computer to an Internet Service Provider's ("ISP's") "point of presence," which in turn is connected to the Internet "backbone." In addition to providing a connection to the Internet, most ISPs also provide services — including email, user support, and the ability to build web pages on the ISP's servers — as well as proprietary content. Customers connecting to the Internet via a traditional narrowband connection have many ISPs to choose from: There are thousands of such providers nationwide. But because of the limitations of the wires connecting the user's computer to the ISP's point of presence, data transmission over them is quite slow and does not afford users the capacity to access streaming video or audio content.[2]

[1] The Commerce Department's figures are as of September 2001. Given that the report notes that the number of people using the Internet had increased by some 26 million in the thirteen months prior to the initiation of the study, it is likely that there has been a substantial increase between 2001 and today.

[2] Dial-up allows for transfer of data at a rate of 56 kilobits per second (kbps). *See FCC AOL-Time Warner Merger Order*, 16 F.C.C.R. 6547, 6551 n. 11, 2001 WL 55636 (2001). Cable modem service can transmit data at a rate of up to 10 megabits per second (mbps). Thus while dial-up moves thousands of bits per second, broadband moves millions.

By contrast, residential high-speed (or "broadband") Internet service allows for much faster and easier use of the Internet, including streaming audio and video. As such, it has been called "the holy grail of media companies." Mark A. Lemley & Lawrence Lessig, *The End of End-To-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 926 (2001). Currently, there are two principal "pipelines" through which consumers can receive broadband access: digital subscriber lines ("DSL") and cable lines.[3] DSL uses the same copper wires employed in telephone service and dial-up access,[4] while cable modem service uses the network of coaxial cable employed to transmit television signals. Because the copper wires used for telephone ser-

[3] There are two other types of high-speed Internet access available — satellite and fixed wireless — but their deployment is very limited: As of 2001, only 3 percent of residential broadband subscribers use these alternative services.

[4] For a description of DSL technology, see *WorldCom, Inc. v. FCC*, 246 F.3d 690, 692 (D.C. Cir. 2001) ("Packet-switching and digital subscriber line technologies ('DSL') make it possible to send data at high speed over conventional copper wire. Two DSL modems are attached to a telephone loop, one at the subscriber's premises and one at the telephone company's central office. If the line carries both ordinary telephone service and high-speed data transmission, the carrier must separate these streams at the company's central office, using a digital subscriber line access multiplexer. With this device the carrier sends ordinary voice calls to the public, circuit-switched telephone network (which keeps a phone line open during a voice call) and sends data traffic to a packet-switched data network (which compresses data and can send it in split-second bursts during gaps on a line), where it can then be routed to a corporate local area network or Internet service provider ('ISP').")

vice and coaxial cable used for cable television are already installed in most Americans' homes, telephone and cable companies have been able to deploy broadband Internet access relatively quickly and cheaply. In the case of DSL, an ISP uses equipment located at the telephone company to transmit Internet service to its subscribers. In the case of cable modem service, the connection to the Internet occurs at the "headend," or the origination point for signals in the cable system.[5] In contrast to DSL service, however, where multiple ISPs may compete in the provision of Internet service over the same DSL pipeline, most cable operators either provide Internet service themselves or provide the service in conjunction with ISPs specifically created and owned by the cable operators. Thus, cable-owned or cable-affiliated ISPs — unlike most dial-up and many DSL ISPs — essentially own the "last mile" (i.e., the connection between the headend and the subscriber's home), giving them the power to restrict other ISPs' access to cable subscribers.

High-speed Internet service via DSL or cable modem is available to approximately 75 percent of households. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4803 (2002), *available* at 2002 WL 407567 (hereinafter "Declaratory Ruling"). And while only eleven percent of all households subscribe to a broadband Internet service, residential use of high-speed, broadband service is increasing. *See A Nation Online* at 2. Approximately 70 percent of residential broadband subscribers receive their broadband service via cable modem. Declaratory Ruling at 4803.

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[5] Some cable providers have "super headends" to house data servers, routers, and other Internet-related equipment.

Congress has addressed the burgeoning market for advanced computer services in the Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56, through which it sought to provide a "pro-competitive, de-regulatory national policy framework" designed to promote the "deployment of advanced telecommunications and information technologies to all Americans by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458, at 113 (1996). To that end, the statute maintained significant common carrier obligations on providers of "telecommunications services" but left providers of "information services" subject to much less stringent regulation.

This distinction tracked a series of prior administrative decisions by the FCC. Beginning in 1980, the FCC distinguished "basic" telecommunications services from "enhanced" information services in the belief that ensuring access to the former would encourage competition in the latter and provide consumers with a wider variety of information services. *In the Matter of Section 64.702 of the Comm'n's Rules & Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 417 (1980). The 1996 law raised the question of whether the new broadband internet technologies qualified as telecommunications services, information services, or a combination of the two.

The FCC did not initially take a position on the regulatory classification of cable modem service. A number of federal courts, however, construed the statute in the context of challenges to other local or federal regulatory decisions. In *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), we reviewed the open access conditions a local franchise authority had placed on the sale of a cable franchise. As discussed in detail below, we held that cable modem service did not qualify as a "cable service"

and that it contained both information service and telecommunications service components. As a result, the local franchise authority could not impose conditions on the sale. At approximately the same time, a court in the Eastern District of Virginia invalidated a local ordinance that imposed open access requirements on cable modem service, concluding that cable modem involved a telecommunications component and that it also qualified as cable service. *MediaOne Group, Inc. v. County of Henrico*, 97 F. Supp. 2d 712, 714-15 (E.D. Vir. 2000), *aff'd*, 257 F.3d 356 (4th Cir. 2001). *See also Gulf Power Co. v. FCC*, 208 F.3d 1263, 1277 (11th Cir.2000), *rev'd*, 534 U.S. 327 (2002) (holding that the FCC could not regulate pole attachments for internet services because they did not qualify as telecommunications services).

In part as a response to these decisions, the FCC on September 28, 2000 issued a notice of inquiry, *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19287, *available at* 2000 WL 1434689 (hereinafter "NOI"). In the NOI, the FCC announced its intention "to determine what regulatory treatment, if any, should be accorded to cable modem service and the cable modem platform used in providing this service." *Id.* at 19287. Specifically, the FCC requested comment on whether it should classify "the cable modem platform as a cable service[6] subject to Title VI [of the Communications Act];

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[6] "Cable service" is defined in the Act as:

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service.

47 U.S.C. § 522(6).

as a telecommunications service[7] under Title II; as an information service[8] subject to Title I; or some entirely different or hybrid service subject to multiple provisions of the Act." *Id.* at 19293. In requesting comment, the FCC noted that "[i]t is particularly important to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners." *Id.* at 19288.

On March 15, 2002, after receiving some 250 comments and meeting with a variety of industry representatives, consumer advocates, and state and local government officials regarding the NOI, the FCC issued its Declaratory Ruling along with a notice of proposed rulemaking ("NPRM"). In the Ruling, the Commission concluded that "cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service." Declaratory Ruling, 17 F.C.C.R. at 4802. The FCC's classification of cable modem service, if upheld, would mean that, to the extent they provide such service, cable operators would be sub-

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[7] The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

[8] "Information service" is defined as

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20).

ject to regulation not as cable service providers under Title VI of the Act, 47 U.S.C. § 521 *et seq.*, nor as common carriers under Title II, § 201 *et seq.*, but rather as providers of an information service under the less stringent provisions of Title I, § 151 *et seq*. Accordingly, in the NPRM that accompanied the NOI, the Commission sought to "address the regulatory implications of [its] decision." 17 F.C.C.R. at 4839. Specifically, FCC requested comments regarding (1) the implications of the classification for the Commission's parallel rulemaking with respect to DSL service;[9] (2) the scope of the Commission's jurisdiction to regulate cable modem service, including whether there are any constitutional limitations on the exercise of that jurisdiction; (3) the need, if any, to require cable operators to provide access to competing ISPs; (4) the effects of the regulatory classification on the marketplace for and the continued deployment of broadband service; (5) "the role of state and local franchising authorities in regulating cable modem service"; and (6) "the relationship between our classification determination and statutory or regulatory provisions concerning pole attachments, universal service, and the protection of subscriber policy." *Id.* at 4839-40.

Seven different petitions for review of the Commission's ruling were filed in the Third, Ninth, and District of Columbia Circuits. None of the petitioners challenge the FCC's conclusion that cable modem service is an information service. Rather, each contends that the Commission should not have stopped there — that is, that the Commission should have made an *additional* determina-

[9] *See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019 (2002), *available at* 2002 WL 252714.

tion. The first group of petitioners[10] argues that cable modem service is both an information service and a telecommunications service, and is therefore subject to regulation on a common-carriage basis.[11] The second group of petitioners[12] asserts that cable modem service is both an information service and a cable service, and therefore is subject to regulation by local authorities as provided in the Act. The final petitioner, Verizon, advances a third variation on the "the FCC did not go far enough" theme, arguing that the Commission was correct to classify cable modem service as solely an information service, but should have taken the additional step of conferring the same designation on the DSL service provided by telephone companies.

On April 1, 2002, the Judicial Panel on Multidistrict Litigation transferred the related petitions for review to this court for consolidation with Brand X's petition.

II

Normally, when we review an agency's interpretation of the statute it is charged with administering, we apply the two-step formula set forth by the Supreme Court in

[10] Advancing this argument are Brand X, EarthLink, the State of California, and the Consumer Federation of America.

[11] The practical result of such a classification is that cable broadband providers would be required to open their lines to competing ISPs.

[12] There are two groups of petitioners advancing this argument. The first includes the National League of Cities, the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National Association of Counties, and the Texas Coalition of Cities for Utility Issues (hereinafter "NLC"). The second group comprises five Pennsylvania townships: Conestoga, Providence, Martic, Buckingham, and East Hempfield (hereinafter "Townships").

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). The reviewing court must look first to the language of the statute: "If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. If the statute is silent or ambiguous, "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843. Where the agency's interpretation of the statute is reasonable, the court must defer. *Id.*

That the FCC is the agency Congress has charged with the administration of the Communications Act is beyond cavil. *See* 47 U.S.C. § 151 (establishing the FCC and giving it authority to "execute and enforce the provisions of this chapter"). The FCC, however, is not the only, nor even the first, authoritative body to have interpreted the provisions of the Communications Act as applied to cable broadband service. A prior three-judge panel of this court did precisely that in *Portland*. Petitioners Brand X, EarthLink, and the State of California argue that the panel is bound by our court's interpretation of the statute, while the FCC, joined by two of the Petitioners, contends that we are not.

Before we can address the substance of these arguments, however, we must discuss our *Portland* decision in some detail.

A

AT&T v. City of Portland arose out of the merger between AT&T, then the nation's largest long-distance provider, and Telecommunications, Inc. ("TCI"), one of the largest cable television operators and also, in some areas of the country, a provider of cable broadband service.

In order to complete the merger, the two companies had to secure the approval of three different governmental bodies: the Justice Department, the FCC, and the local cable franchising authorities in the City of Portland and Multnomah County. While the federal authorities ultimately assented to the merger, securing the approval of the local authorities proved more difficult. The Communications Act gives local franchising boards the right to approve any sale or transfer of a cable franchise when such approval was required by the local franchising agreement. *See* 47 U.S.C. § 537. TCI's franchise agreements with Portland and Multnomah County gave the local franchising boards the power to "'condition any Transfer upon such conditions, related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of the Franchise, as it deems appropriate.'" *Portland*, 216 F.3d at 875. Concerned that AT&T might shut out competing ISPs by restricting cable broadband access to its own proprietary ISP, Portland and Multnomah County — pursuant to their authority under the franchise agreements — sought to condition AT&T's acquisition of the cable franchises upon the provision of open access to its cable broadband network for competing ISPs. AT&T filed suit claiming that the local franchise authorities lacked the power to impose such a condition. The district court granted summary judgment to Portland and AT&T appealed to this court.

"Because Portland premised its open access condition on its position that [cable modem service] is a 'cable service' governed by the franchise," *id.* at 876, we first looked to the statutory definition of "cable service." Noting that the "[t]he essence of cable service [as defined in the Act] . . . is one-way transmission of programming to subscribers generally," we concluded that "the definition does not fit" cable modem service, whose salient charac-

teristics are "not one-way and general, but interactive and individual." *Id.* Because cable modem service was not a cable service under the terms of the Act, we held that "Portland may not directly regulate [it] through its franchising authority." *Id.* at 877.

Having determined that "a cable operator may provide cable broadband Internet access without a cable service franchise," we then turned to the issue of "whether Portland may condition AT&T's provision of standard cable service upon its opening access to the cable broadband network for competing ISPs." *Id.* In order to resolve this issue, we found it necessary to "determine how the Communications Act defines [cable broadband service]." *Id.* We quote our analysis in full:

> Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a "point of presence" assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A provider of telecommunications services is a "telecommunications carrier," which the Act treats as a common carrier to the extent that it provides telecommunications to the public, "regardless of the facilities used." 47 U.S.C. §§ 153(44) & (46).
>
> By contrast the FCC considers the ISP as providing "information services" under the Act, defined as

> "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20) (1996). As the definition suggests, ISPs are themselves users of telecommunications when they lease lines to transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the "public" in terms of the statutory definition of telecommunications service, they provide "information services," and therefore are not subject to regulation as telecommunications carriers. . . .
>
> Like other ISPs, [AT&T's cable broadband service] consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, [the cable broadband provider] controls all of the transmission facilities between its subscribers and the Internet. To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

Id. at 877-78. *Cf. Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 352 n. 4 (2002) (Thomas, J., concurring in part and dissenting in part) (describing high-speed Internet access as requiring "two separate steps," transmission from the consumer to the ISP's point of presence and the connection between the ISP's point of presence and the Internet, and recognizing that the FCC

had not yet classified the first, transmission step in the cable context.).

Because we found that the transmission element of cable broadband service constitutes telecommunications service under the terms of the Communications Act — and because the Act provides that "[a] franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator," 47 U.S.C. § 541(b)(3)(B) — we concluded that Portland and Multnomah county were barred from conditioning the franchise transfer upon AT&T's provision of open access to its broadband network. *Portland*, 216 F.3d at 878-79.

B

As an initial matter, we must reject the implication — or, in the case of petitioner NLC the assertion — that we did not have to confront the regulatory classification of cable modem service in *Portland*, and that, as a result, our discussion of that issue is *dicta*. Such an assertion can be squared neither with our holding in *Portland* nor with our own precedent. First, we note that in the course of determining whether § 541(b)(3) barred the imposition of any conditions on the sale there at issue, the *Portland* court explained that "we *must* determine how the Communications Act defines [cable modem]." *Portland*, 216 F.3d at 877 (emphasis added). And the concluding paragraph of our *Portland* opinion begins: "We *hold* that subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, *because* the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act." *Id.* at 880 (emphasis added). In light of this rather unequivocal language, it cannot be

gainsaid that we considered the regulatory classification of broadband service an essential element of our decision, and thus part of our holding. Our treatment of the issue, therefore, does not meet the definition of *dicta*. *See Best Life Assurance Co. v. Comm'r*, 281 F.3d 828, 834 (9th Cir. 2002) (defining *dictum* as "a statement 'made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential . . .'") (quoting *Black's Law Dictionary* 1100 (7th ed. 1999)).

Even were we to assume *arguendo* that the FCC and petitioners are correct in asserting that we did not have to reach the issue of cable broadband's classification under the Act, it is clear from our holding that we did, in fact, reach the issue. "As we have noted before, where a panel confronts an issue germane to the eventual resolution of the case, and resolves it after reasoned consideration in a published opinion, that ruling becomes the law of the circuit, regardless of whether doing so is necessary in some strict logical sense." *Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1186 (9th Cir. 2003) (per curiam) (internal quotation marks omitted).

It remains for us to determine what effect, if any, the FCC's subsequent interpretation of the Communications Act, as set forth in its Declaratory Ruling, has upon the continuing vitality of our holding in *Portland*.

C

[1] It is well established in this and other federal courts of appeals that three-judge panels are bound by the holdings of earlier three-judge panels. *See United States v. Camper*, 66 F.3d 229, 232 (9th Cir. 1995); *Indus. Turnaround Corp. v. NLRB*, 115 F.3d 248, 254 (4th Cir. 1997) ("A decision of a panel of this court becomes the law of the circuit and is binding on other panels unless it

is overruled by a subsequent en banc opinion of this court or a superseding contrary decision of the Supreme Court.") (internal quotation marks omitted).

[2] In addition to the obvious exceptions to this rule, *see, e.g., In re Watts*, 298 F.3d 1077, 1084 (9th Cir. 2002) (O'Scannlain, J., concurring) ("We need not convene the en banc court when the Supreme Court reverses us directly. Nor must we do so when that Court, in reviewing a case from another circuit, knocks the props out from under one of our decisions."), our circuit has provided for an exception where our precedent conflicts with a subsequent agency interpretation. In *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (en banc), we held that "if a panel finds that an [agency] interpretation of [its statute] is reasonable and consistent with the law[ ], the panel may adopt that interpretation even if circuit precedent is to the contrary." *Id.* at 1136. We immediately qualified this holding by stating that the earlier panel decision may be disregarded in favor of the agency interpretation "only where the precedent constituted deferential review of [agency] decisionmaking." *Id.* "If the precedent held either that the [agency] decision was unreasonable or the only possible interpretation of the statute," then the prior court's construction trumps the agency's interpretation. *Id.*

[3] The FCC argues that because we did not assert in *Portland* that our construction of the statute was the "only possible interpretation of the statute," we ought not be bound by it here, and instead are free to review the agency's interpretation on a clean slate. The FCC, however, ignores *Mesa Verde's* clear mandate that precedent can be disregarded in favor of a subsequent agency interpretation "only where the precedent constituted deferential

review of [agency] decisionmaking." *Mesa Verde*, 861 F.2d at 1136. In *Portland*, we took pains to "note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us. Thus we are not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Portland*, 216 F.3d at 876.

[4] Furthermore, while we never explicitly stated in *Portland* that our interpretation of the Act was the only one possible, we never said the relevant provisions of the Act were ambiguous. Thus, *Mesa Verde's* requirements are not met in this instance and *Portland's* construction of the Communications Act remains binding precedent within this circuit, even in light of the FCC's contrary interpretation of the statute.

We find further support for this conclusion in the Supreme Court's holding in *Neal v. United States*, 516 U.S. 284 (1996). There, the Court was presented with a challenge to a sentence imposed following the appellant's conviction for possession of LSD (lysergic acid diethylamide). Appellant contended that the district court erred in imposing a 10-year sentence pursuant to the mandatory minimum set forth in the Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207, as construed by the Supreme Court in *Chapman v. United States*, 500 U.S. 453 (1991) (holding that for sentencing purposes, under the terms of the mandatory minimum statute, the actual weight of the LSD possessed by the defendant included the blotter paper onto which the drug is placed). The appellant noted that, subsequent to *Chapman*, the Sentencing Commission had revised the Guidelines to establish a "presumptive weight" of 0.4 milligrams for each dose of LSD, and argued that this revision effectively supplanted

the rule announced in *Chapman*. In essence, the appellant contended that the revision of the Guidelines by the Commission was an interpretation of the statute the Court construed in *Chapman* and, "because the Commission is the agency charged with interpretation of penalty statutes and expert in sentencing matters," its construction had to be given deference. *Neal*, 516 U.S. at 290.

The Court rejected petitioner's argument, noting first that the Sentencing Commission's commentary was an attempt to revise the Sentencing Guidelines and not an attempt to interpret the penalty statute itself. It continued:

> Were we, for argument's sake, to adopt petitioner's view that the Commission intended the commentary as an interpretation of [the statute] . . . he still would not prevail. The Commission's [interpretation] cannot be squared with *Chapman*. . . . In these circumstances, we need not decide what, if any, deference is owed the Commission in order to reject its alleged contrary interpretation. Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.

Neal, 516 U.S. at 294-95. Notwithstanding the Supreme Court's use of the term "we," there is nothing to suggest that *Neal's* rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone. *See, e.g., Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("*[J]udicial* construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.") (emphasis added); *accord*

United States v. Mead Corp., 533 U.S. 218, 248-49 (2001) (Scalia, J., dissenting) ("I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency — or have allowed a lower court to render an interpretation of a statute subject to correction by an agency.").[13]

III

[5] Our holding in *Mesa Verde*, along with that of the Supreme Court in *Neal*, requires our adherence to the interpretation of the Communications Act we announced in *Portland*. There, we concluded that cable broadband service was not a "cable service" but instead was part "telecommunications service" and part "information service." Because the Commission's Declaratory Ruling agreed with our conclusion that cable broadband service is not "cable service," but disagreed with our conclusion that it is in part "telecommunications service," we must

[6] AFFIRM in part, VACATE in part, and REMAND for further proceedings not inconsistent with this opinion.[14]

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[13] The Supreme Court's recent decision in *Nat'l Cable & Telecomms. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327 (2002) ("*Gulf Power*"), handed down after our *Portland* decision but before the FCC's Declaratory Ruling, does not compel a different result. There the Court was faced with challenges to FCC orders determining the rents to be paid by cable and telecommunications service providers for the attachment of their wires to utility poles. The Court explicitly noted that the FCC had not yet categorized cable modem service and "address[ed] only whether pole attachments that carry commingled services are subject to FCC regulation at all." *Id.* at 338.

[14] Because the various petitioners' claims all revolve around the FCC's central classification decision, which we have vacated, we decline here to consider their remaining claims (including those di-

O'SCANNLAIN, Circuit Judge, concurring:

I concur in the court's conclusion that, in light of our holding in *Mesa Verde*, we are bound by our own interpretation of the Telecommunications Act in *Portland* and must vacate the FCC's Declaratory Ruling.

I write separately to note that our adherence to *stare decisis*, even in the face of a subsequent agency interpretation contrary to our *Portland* decision, produces a result "strikingly inconsistent with *Chevron's* underlying principles." Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 Admin. L. Rev. 173, 192 (2002); *see also* Richard L. Pierce, Jr., *Reconciling Chevron and* Stare Decisis, 85 Georgetown L.J. 2225, 2260 (1997) (advocating a nuanced approach to conflicts between *stare decisis* and subsequent agency interpretations, and rejecting rigid adherence to precedent).

As Part I of the court's opinion makes clear, the market for Internet services — what we called in *Portland* a "quicksilver technological environment," *Portland*, 216 F.3d at 876 — is evolving quite rapidly. Indeed, it is the desire to ensure the continued development of this market — and to further Congress' oft-stated desire that there be broad, nationwide access to broadband Internet service — that drove the FCC to take the action we vacate today.

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rected at the validity of the FCC's determination that AOL Time Warner offers cable transmission to unaffiliated ISPs on a private carriage basis and its waiver of the *Computer II* requirements for cable companies who also offer local exchange service), leaving them for reconsideration by the FCC on remand.

One can disagree — and indeed the seven petitioners and numerous *amici* do disagree, vigorously — about whether the FCC's regulatory classification of cable modem service would move us closer to or farther away from achieving those important goals. Regardless of one's view of the wisdom of the FCC's declaratory ruling, it cannot be denied that our holding today effectively stops a vitally important policy debate in its tracks, at least until the Supreme Court reverses us or Congress decides to act.[1]

While my belief in the importance of *stare decisis* as a check on judicial power is as staunch as anyone's, *see Miller v. Gammie*, 335 F.3d 889, No. 01-15491, 2003 WL 21540416, at *11 (O'Scannlain, J., concurring in part) (noting "the clear authority of the en banc court to do what three-judge panels normally cannot — namely, overrule prior decisions of three-judge panels"), adherence to *stare decisis* in the present case — coming as it does in a decision that determines the outcome of seven different petitions for review from three different circuits consolidated and assigned randomly to this court by the Judicial Panel on Multidistrict Litigation — appears to aggrandize, rather than limit our power over an admittedly complicated and highly technical area of telecommunications law. For, strict adherence to the rule we reaffirm

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[1] Our decision could suffer a third, decidedly more drastic fate. Given the importance of the regulatory classification of broadband internet service, one wonders whether our decision today will prompt the FCC to follow the example of the Social Security Administration, the National Labor Relations Board, and the Internal Revenue Service, among other federal agencies, in adopting a policy of "nonacquiescence" in the face of court rulings with which the agency disagrees. *See generally*, Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 Yale L.J. 679 (1989).

today[2] "appends a subversive codicil to *Chevron's* rule that Congress gives agencies, rather than courts, 'whatever degree of discretion the ambiguity [of a statute] allows,' — that is, unless courts take it first." Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1273 (2002) (quoting *Smiley v. Citibank (S.D.), N.A.*, 517 U.S. 735, 741 (1996)).[3] Our *Portland* decision, in essence, beat the FCC to the punch, leading to the strange result we are compelled to reach today: three judges telling an agency acting within the area of its expertise that its interpretation of the statute it is charged with administering cannot stand — and that *our* interpretation of how the Act should be applied to a "quicksilver technological environment," *Portland*, 216 F.3d at 876, is the correct, indeed the only, interpretation.[4]

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[2] That is, that three-judge panels can disregard precedent in favor of a subsequent contrary agency interpretation *only* when the earlier court (1) was proceeding in a deferential posture and (2) did not declare that its interpretation of the statute was the *only* possible interpretation. *See* Slip Op. at 14766.

[3] The dangerousness of this "codicil to *Chevron*," is made all the more clear in the wake of the Supreme Court's recent decision in *United States v. Mead*, 533 U.S. 218 (2001), which "limited the types of agency interpretations that are binding on courts, thereby increasing significantly the frequency with which courts will be able to resolve ambiguity preclusively before an agency can act decisively." Bamberger, *Provisional Precedent*, *supra* at 1275.

[4] Aside from the incongruity of the result in the instant case, the broader implications of the rule we apply today are quite dramatic. Foremost among them, as Justice Scalia noted in his dissent in *Mead*, is the potential for

> the ossification of large portions of our statutory law. . . . Once the court has spoken, it becomes *unlawful* for the agency to take a contradictory position; the statute now *says* what the court has prescribed. . . . It will be bad enough when this ossification occurs as a result of judicial determination (under today's new principles) that there is no affirmative indication of congressional intent to "delegate"; but it will be positively bizarre when it occurs simply because of an agency's failure to act by rulemaking (rather than informal adjudication) before the issue is presented to the courts.

Mead, 533 U.S. at 246 (Scalia, J., dissenting). This case, it seems to me, presents precisely the "positively bizarre" scenario envisioned by Justice Scalia.

Strange as this result may seem, I concur in the court's opinion only because I believe our court's precedent compels it.

THOMAS, Circuit Judge, concurring:

I agree that our prior decision in *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), controls the statutory interpretation question and requires a remand. I write separately to underscore my conclusion that *City of Portland* was correctly decided. Considered in its entirety, the 1996 Telecommunications Act compels the conclusion that cable modem contains a telecommunications service component.

A

This is not a case that implicates *Chevron* deference, not only for the reasons noted in our unanimous opinion, but also because it is a question of pure statutory interpretation. In reviewing an administrative agency's construction of the statute it administers, we must consider first "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of

Congress.'" *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) (quoting *Chevron*, 467 U.S. at 843). In making that assessment, we look not only at the statutory section in question, but also analyze the provision in the context of the governing statute as a whole, *see id.* at 132, presuming congressional intent to create a "'symmetrical and coherent regulatory scheme.'" *Id.* at 133 (quoting *Gustafson v. Alloyd Co.*, 513 U.S. 561, 569 (1995)). If, after conducting such an analysis, we conclude that Congress has not addressed the issue, that is, that "'the statute is silent or ambiguous' — we proceed to the second step, where we decide whether the agency's interpretation 'is based on a permissible construction of the statute.'" *Pacheco-Camacho v. Hood,* 272 F.3d 1266, 1268 (9th Cir. 2001) (quoting *Chevron,* 467 U.S. at 843). In short, if our analysis indicates that the statute is silent or ambiguous, we "must respect the agency's construction of the statute so long as it is permissible." *Brown & Williamson*, 529 U.S. at 134 (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 424 (1999)).

In *City of Portland*, we engaged in this analytical exercise and concluded that Congress meant what it said in defining "telecommunications." We did not discern any ambiguity in the statutory meaning for the agency to interpret; thus, *Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*. As the Supreme Court stated in *Barlow v. Collins*, 397 U.S. 159, 166 (1970): "[When] the only or principal dispute relates to the meaning of the statutory term, the controversy must ultimately be resolved, not on the basis of matters within the special competence of the [agency], but by judicial application of canons of statutory construction." As the Supreme Court has emphasized, "[t]he judiciary is the final authority on

issues of statutory construction." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987) (quoting *Chevron*, 467 U.S. at 843 n.9).

Our role in statutory interpretation is necessarily different from that of an agency's. As Judge Kozinski has explained:

> But in performing their proper function, judges must listen for the voice of the legislature, not to the sound of their own heartbeats. Because courts are bound by the best construction of the statute, they may alter their interpretation only in response to a powerful new insight as to the law's meaning, not because a different panel of judges prefers a different result.
>
> Agencies, on the other hand, may turn on a dime: Their proper function is to fill in policy gaps pursuant to an explicit or implicit delegation of authority from Congress. *See, e.g., Morton v. Ruiz*, 415 U.S. 199, 231, 94 S.Ct. 1055, 1072, 39 L.Ed.2d 270 (1974) ("[t]he power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress"). Where Congress has delegated such authority, the statute becomes a clear vessel which changes its tint as it is filled and refilled by various policy pigments. Because the agency administering the statute is not bound to a single formulation of statutory language, it may make changes without considering whether the new approach more accurately reflects the meaning of the statute.

Mesa Verde Constr. Co. v. N. Cal. Dist. Council of Laborers, 861 F.2d 1124, 1146-47 (9th Cir. 1988) (en banc) (Kozinski, J., dissenting).

Thus, once we have fulfilled our judicial function in interpreting an act of Congress and have determined the meaning is clear, the subsequent action of an agency cannot and should not alter our conclusion. If it did, then case law would be in a constant state of uncertainty, awaiting a new interpretation by an agency.

That being said, given the present context, it is appropriate to explain why I believe the interpretation of *City of Portland* was correct.

B

As noted in both *City of Portland* and our opinion today, Internet access involves two separate services: an information service that provides e-mail, web browsing, and other means of manipulating information, and a telecommunications "pipeline" that transmits the actual data. The statute defines and regulates these two components separately, in accordance with the historic distinction between basic and enhanced services. 47 U.S.C. § 153(20), (46). Although this differential is more apparent when two different companies are involved, the same statutory framework applies when a single company provides the two services.

Telecommunications means "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Everyone agrees that cable modem users will have the capacity to send and receive email and download pre-existing content from websites. These activities involve, at least in part, the transmission of "information of

the user's choosing" without any change in form or content by the cable company. Naturally, integrated cable modem services also offer subscribers the "capability" for "generating, acquiring, storing, . . . [and] retrieving" this information through email software, web browsers, and the like, activity that clearly falls within the definition of "information service." 47 U.S.C. § 153(20). However, under the statutory definition, the "information service" includes only the "capability" to generate, transmit, and receive email and information "via telecommunications." The *actual transmission*, that is, putting this *capability* into practice, falls outside the definition and requires additional "telecommunications."[1]

The FCC acknowledges that cable modem service must be provided "via telecommunications" but insists that cable modem does not involve "telecommunications service" because it does not involve the "offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). Rather, the agency suggests, customers purchase an integrated package of services that may include telecommunications but does not include telecommunications service. In other words, the agency places a great deal of weight on the distinction between "telecommunications" and "telecommunications service." However, the full statutory definition, the overall legislative scheme, and the associated regulatory history clearly indicate that cable modem provides not only telecommunications but also telecommunications service.

Congress defined "telecommunications service" as "the offering of telecommunications for a fee directly to the

[1] The definition of information service explicitly excludes "any use of such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Cable modem subscribers who use the cable company's own information services transmit that information via the telecommunications pipeline offered by the cable company. As the FCC admits, other cable modem subscribers may completely "bypass that company's web browser, proprietary content, and e-mail" and "click through" to another service. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4815 (2002). Both classes of cable modem subscribers pay a monthly "fee" "directly" to the cable company in order to use "telecommunications." Nothing in the definition suggests that the telecommunications component must be priced or offered separately in order to qualify as a telecommunications service. Under the FCC's approach, the general public would be purchasing a service that nobody offered.

Prior to the decision in this case, the FCC consistently recognized that Internet access implied the separate provision of a telecommunications service by some entity. In the conventional world of dial-up access over "plain old telephone service," the agency classified the Internet Service Provider (ISP) as an information service and the telephone service as a telecommunications carrier. *See, e.g., In the Matter of Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,539-40 (1998). When a local telephone company simultaneously offered Internet access, it was still required to offer the telecommunications services to other ISPs on a common carrier basis. *See, e.g., In the Matter of Bell Operating Cos. Joint Petition for Waiver of Computer II Rules*, 10 F.C.C.R. 13,758, 13,767-68 (1995) (discussing Pacific Bell's offering of Internet access service and its compliance with unbundling requirements).

Similarly, when the FCC first applied the 1996 law to integrated broadband services, the agency concluded that Internet access via DSL contained both information service and telecommunications service components:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g. the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Deployment of Wireline Servs. Offering Advanced Telecomms. Capability, 13 F.C.C.R. 24,012, 24,030 (1998). Thus, the decision by some of the Bell Operating Companies (BOCs) to offer an "integrated" Internet access package did not affect the regulatory classification. Instead, the FCC noted that "BOCs offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs non-discriminatory access to the telecommunications services utilized by the BOC information services." *Id.* at 24,031. This position reflects a much more reasonable reading of the statute.[2]

Other provisions in the Telecommunications Act buttress the idea that companies may offer telecommunications services even when they also offer other services. First, the Act extends common carrier requirements to

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[2] The agency has now decided to reconsider its treatment of DSL broadband service. *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C. Rcd. 3019 (2002).

every telecommunications carrier (defined as "any provider of telecommunications services"), but "only to the extent that it is engaged in providing telecommunications services." 47 U.S.C. § 153(44). Thus, under the statutory scheme, some "providers of telecommunications services" may simultaneously provide other services, presumably including information services, which would be subject to a separate regulatory regime. Second, as mentioned in *City of Portland*, 216 F.3d at 879, the pole attachment provisions at 47 U.S.C. § 224(d)(3) at least contemplate the possibility that a cable system may provide telecommunications service. *See also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 353-54 (2002) (Thomas, J., concurring in part and dissenting in part) (arguing that because the FCC had not yet classified cable modem service, it could not yet regulate the pole attachment rates).

Third, Congress instructed the FCC and state commissions "with regulatory jurisdiction over telecommunications services" to use their regulatory powers in order to encourage the deployment of "advanced telecommunications capability." Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, § 706(a), 110 Stat. 56, 153 (1996). The Act defined this "advanced telecommunications capability" as "high speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." *Id.* at § 706(c)(1), an apt description of cable modem service. Although this section does not explicitly state that the "telecommunications capability" inherent in cable modem must include a "telecommunications service," the state and federal regulatory powers referenced in this section have traditionally been applied to basic transmission services rather than enhanced information services. *See,*

e.g., In the Matter of Section 64.702 of the Comm'n's Rules & Regulations (Second Computer Inquiry), 77 F.C.C.2d. 384, 431-33 (1980) (noting the FCC only had authority over enhanced services under the general provisions of Title I and refraining from imposing regulations).[3] This suggests that Congress intended some component of the "advanced telecommunications capability" to be subject to the Title II powers governing telecommunications services.

Turning to the law as a whole, the 1996 Act was designed to accelerate the private sector deployment of advanced telecommunications and information technologies "by opening all telecommunications markets to competition." H.R. Conf. Rep. No. 104-458 at 113; *see also* Stuart Minor Benjamin, et al., *Telecommunications Law and Policy* 716 (2001) (noting that the 1996 Act was designed in part to increase competition in telecommunications markets and promote increased access to advanced telecommunications services). As we recognized in *City of Portland*, the Act mandates "a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunication carriers." *City of Portland*, 216 F.3d at 879. In order to foster this competition, the 1996 Act applies the traditional common carrier obligations of non-discrimination and interconnectivity to telecommunications service providers "regardless of the facilities used." 47 U.S.C. § 153(46). Application of these principles to cable modem service would enhance independent ISP access to telecommunications facilities, almost certainly increasing consumer choice. Naturally, the FCC may choose to forbear from enforcing these regulations if it determines they are not necessary to pro-

[3] As discussed below, Congress incorporated a similar distinction into the structure of the 1996 Act.

mote competition or protect consumers. 47 U.S.C. § 160(a)-(b).[4] Nonetheless, the Act creates a general presumption in favor of opening markets to competition.

The evolution of advanced telecommunications regulation prior to the 1996 Act reflects the same underlying belief that widespread access to "basic" transmission facilities would spur competition in "enhanced services" and provide consumers with a wider variety of more closely tailored products. *See, e.g., Second Computer Inquiry*, 77 F.C.C.2d at 417. Under this "*Computer II* "framework, the FCC subjected basic transmission services to common carrier regulations and left enhanced services largely unregulated. Companies that owned transmission facilities and offered both basic and enhanced services were required to separate out the basic transmission component and offer it to all providers of enhanced services, subject to the interconnectivity and non-discrimination requirements of Title II. *In the Matter of Indep. Data Communications Mfrs. Ass'n*, 10 F.C.C.R. 13,717, 13,719 (1995).

These decisions formed the regulatory background for the 1996 Act, in which Congress created the new, corresponding categories of "information services" and "telecommunication services." The FCC previously acknowledged that Congress intended the categories in the 1996 Act to "parallel" those developed through the *Computer II* decisions:

> Reading the statute closely, with attention to the legislative history, we conclude that Congress in-

[4] The FCC argued in its brief that sufficient competition exists across broadband technologies, though several petitioners argued vigorously that many subscribers, especially in rural areas, do not have access to broadband alternatives such as DSL.

> tended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our *Computer II* proceedings. . . .

Universal Service, 13 F.C.C.R. at 11,511. Thus, the background regulatory regime required that a bundled package of enhanced services and basic services be separated out and subjected to different requirements. Given this context, the Congressional decision to create "parallel" categories in the new statute creates a presumption in favor of similar treatment for information and telecommunications services.

The specific legislative history of "telecommunications service" provides additional support for the idea that cable modem incorporates a telecommunications service. The House report on its version of the bill implied that "telecommunications service" was distinguished from "telecommunications" largely in order to exclude internal, privately provided telecommunications networks. *See* H.R. Rep. No. 104-204, at 126 ("By defining 'telecommunications service' as those services and facilities offered on a 'common carrier' basis, the Committee recognizes the distinction between common carrier offerings that are provided indifferently to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services."). The Senate report explained that its definition of "telecommunications" excluded "services involving interaction with stored information, that are defined as information services. The underlying transport and switching capabilities on which these information services are based, however, are in-

cluded in the definition of 'telecommunications services.'" S. Rep. No. 104-23, at 18. The report also stated that "'[t]elecommunications service' does not include information services, cable services, or 'wireless' cable services, but does include the transmission, without change in the form or content, of such services." *Id.* Thus, both Houses implied that sale to the public of a service allowing the unaltered transmission of information qualified as a telecommunications service.[5] Although Congress intended information services and telecommunications services to be mutually exclusive under both definitions, *see Universal Service*, 13 F.C.C.R. at 11,522-23, nothing suggests that telecommunications service ceased to be so when offered to the public along with an information service.

The FCC responds that it has already ruled that the mere transmission of unaltered data does not imply that an information service contains a telecommunications service component. *Universal Service*, 13 F.C.C.R at 11,538-39 (1998). According to this 1998 decision,

> The provision of Internet access service involves data transport elements: an Internet access provider must enable the movement of information between customers' own computers and the distant computers with which those customers seek to interact. But

[5] In forging compromise language, the conference committee adopted the general definition of telecommunications service from the Senate bill but deleted the second sentence, "[t]he term includes the transmission, without change in the form or content, of information services of cable services, but does not include the offering of those services." The conference report does not specify why this sentence was deleted, H.R. Conf. Rep. No. 104-458, at 117 (1996), though the FCC later concluded that it had been deleted in order to avoid treating broadcasters and cable systems as telecommunications carriers. *Universal Service*, 13 F.C.C.R. at 11,523.

> the provision of Internet access service crucially involves information-processing elements as well; it offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that it is appropriately classed as an "information service."

Id. at 11,539-40. Critically, however, the Internet service providers at issue in the report "typically own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers. . . ." *Id.* at 11,540. That is, *someone* still has to provide telecommunications service, even though the ISP's resale of this service to the public does not transform the ISP into a telecommunications service provider.[6] In the integrated cable modem context, the same company provides these two, entirely separate services.

Finally, the FCC complains that the interpretation required by *City of Portland* would require it to "find a telecommunications service inside every information service." However, as mentioned, the agency never arrived at this result for dial-up ISPs who either purchased telecommunications services from others or relied upon users to access the ISP through conventional phone lines. *Universal Service*, 13 F.C.C.R. at 11,539. Information services provided by ISPs who purchased telecommunications services from cable companies should be subject to the same regulatory regime. *See, e.g., Indep. Data Communications*, 10 F.C.C.R. at 13,719-20 (1995) (holding that

[6] A telecommunications carrier selling broadband transmission service to ISPs in effect offers telecommunications "to such classes of users as to be effectively available directly to the public" and thus provides "telecommunications service" under 47 U.S.C. § 153(46).

non-facilities-based carriers who offered both enhanced services and basic transmission would be treated as if they only offered enhanced services). The FCC has not demonstrated that cable modem differs in any way that would preclude similar treatment.

In my view, the statutory definitions, combined with the overall regulatory and legislative context, compel the result that cable modem service includes a telecommunications service component. Thus, even if we were writing on a clean slate, my conclusion would be the same as the one we reached in *City of Portland* as to the meaning of the statute.

APPENDIX B

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

INQUIRY CONCERNING HIGH-SPEED ACCESS TO THE INTERNET OVER CABLE AND OTHER FACILITIES

INTERNET OVER CABLE DECLARATORY RULING

APPROPRIATE REGULATORY TREATMENT FOR BROADBAND ACCESS TO THE INTERNET OVER CABLE FACILITIES

GN Docket No. 00-185
CS Docket No. 02-52

DECLARATORY RULING AND NOTICE OF PROPOSED RULEMAKING

Adopted: March 14, 2002
Filed: March 15, 2002

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. Cable modem service provides high-speed access to the Internet,[1] as well as many applications or functions

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[1] For purposes of this proceeding, we use the definition of the Internet that has been adopted by the Federal Networking Council:

that can be used with that access, over cable system facilities.[2] The service is available to approximately 73% of

"'Internet' refers to the global information system that — (i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein." *See FNC Resolution: Definition of 'Internet,' available at* http://www.itrd.gov/fnc/Internet_res.html, visited Jan. 22, 2002. Statutory definitions of the Internet are in Communications Act § 230(f)(1), 47 U.S.C. § 230(f)(1) ("the international computer network of both Federal and non-Federal interoperable packet switched data networks") and Communications Act § 231(e)(3), 47 U.S.C. § 231(e)(3) ("the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit the information.").

[2] We have observed that "Internet access services . . . alter the format of information through computer processing applications such as protocol conversion and interaction with stored data." *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress ("*Universal Service Report*"), 13 FCC Rcd 11501, 11516-17 ¶ 33 (1998) (citations and internal quotations omitted). We note that, for purposes of Section 231 ("Restriction of Access by Minors to Materials Commercially Distributed by Means of World Wide Web That Are Harmful to Minors") of the 1996 Act (*infra* note 13), Congress has defined the term "Internet access service" to mean: "a service that enables users to access content, information, electronic mail, and other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services." 47 U.S.C. § 231(e)(4). We presume that the last sentence is intended to clarify that section 231 was not intended to impair our or a state commission's ability to regulate basic telecommunications services. *See* H.R.

U.S. households.[3] Along with the service's popularity, controversy has grown about its legal status under the Communications Act of 1934, as amended ("the Act"),[4] and about what regulatory treatment (if any) is appropriate under the law and will best serve consumers. The purpose of this proceeding is to resolve these issues.[5]

Rep. 105-570(I) at *20. We also note that litigation concerning the constitutionality of section 231 is underway (*e.g.*, *ACLU v. Reno*, 217 F.3d 162 (3d Cir. 2000), *cert. granted*, 121 S. Ct. 1997 (2001)), but does not concern the definition of Internet access service. The same definition appears in sections 1101(e)(3)(D) and 1104(5) of the Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-1104, 112 Stat. 2681-719 (1998), 47 U.S.C. § 151 note ("Internet Tax Freedom Act").

We have defined "high-speed" Internet access in general as a service that "enables consumers to communicate over the Internet at speeds that are many times faster than the speeds offered through dial-up telephone connections" and that enables subscribers to "send and view content with little or no transmission delay, utilize sophisticated 'real-time' applications, and take advantage of other high-bandwidth services." *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order ("*FCC AOL Time Warner Merger Order*"), 16 FCC Rcd 6547, 6572 ¶ 63 (2001). *See also id.*, 6572 ¶ 64, 6574-77 ¶¶ 69-73.

[3] *See* Richard Bilotti, Benjamin Swinburne, and Megan Lynch, *Industry Overview: The Marquis de Broadbandbury — Parte Deux*, Morgan Stanley Dean Witter ("*Morgan Stanley July 2001 Report*"), July 3, 2001, at 46.

[4] 47 U.S.C. §§ 151 *et seq.*

[5] We do not intend this proceeding to affect high-speed Internet access provided by facilities licensed in Multipoint Distribution Service, Multichannel Multipoint Distribution Service, Local Multipoint Distribution Service, Satellite Master Antenna Television Systems, or other primarily wireless technologies. Also, we are aware of offerings of high-speed Internet access that are targeted at businesses, in-

2. The issue of what, if any, regulatory treatment should be applied to cable modem service dates back to at least 1998, when it arose in the Commission's "First Section 706 Inquiry" about the deployment of advanced telecommunications capability.[6] The Commission further considered the issue in several subsequent proceedings including a complaint case,[7] license transfer reviews in connection with mergers involving cable operators,[8] and a spe-

cluding small ones. *See, e.g.*, Comcast Corp., Broadband Commuter Service, *available at* http://www.comcastbusiness.com/pdf/Broadband Commuter_Service.pdf (visited Feb. 11, 2002). We are not considering those offerings in this proceeding.

[6] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, 13 FCC Rcd 15280, 15308-11 ¶¶ 77-82 (1998). *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report ("*First 706 Report*"), 14 FCC Rcd 2398, 2449 ¶¶ 100-01 (1999).

[7] *Internet Ventures, Inc., Internet On-Ramp, Inc.*, Petition for Declaratory Ruling that Internet Service Providers are Entitled to Leased Access to Cable Facilities Under Section 612 of the Communications Act, File No. CSR-5407-L, Memorandum Opinion and Order ("*Internet Ventures*"), 15 FCC Rcd 3247 (2000).

[8] *See FCC AOL Time Warner Merger Order*, 16 FCC Rcd at 6588-92 ¶¶ 93-100 (prohibiting specific kinds of discrimination against unaffiliated Internet service providers ("ISPs"), their first screens, their content, and the quality of service afforded to them); *America Online, Inc., and Time Warner, Inc.*, Federal Trade Commission, Docket No. C-3989, File No. 001 0105, Decision and Order ("*FTC AOL Time Warner Merger Order*"), §§ II, III (Dec. 14, 2000) (requiring access for a small number of unaffiliated ISPs and prohibiting interference with the content of unaffiliated ISPs and discrimination against the content of unaffiliated ISPs); *Applications for Consent*

cial report by the Commission's Cable Services Bureau.[9] To date, however, the Commission has declined to deter-

to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor to AT&T Corp., Transferee, CS Docket No. 99-251, Memorandum Opinion and Order ("*AT&T-MediaOne Merger Order*"), 15 FCC Rcd 9816, 9869-73 ¶¶ 120-28 (2000) (noting AT&T commitment to provide unaffiliated ISPs with access to its cable systems, and the Department of Justice consent decree requiring AT&T to divest MediaOne's ownership of Road Runner and to seek DOJ approval before entering into certain types of agreements with Time Warner or AOL relating to the provision of high-speed Internet access services); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, CS Docket No. 98-178, Memorandum Opinion and Order ("*AT&T-TCI Merger Order*"), 14 FCC Rcd 3160, 3205-07 ¶¶ 93-96 (1999) (no requirement imposed).

[9] *See* Cable Services Bureau, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission*, Oct. 1999; Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past* (OPP Working Paper Series No. 30, 1998); Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* (OPP Working Paper Series No. 29, 1997) ("*Werbach Paper*"). In addition, local franchising authorities, the Department of Justice, and the Federal Trade Commission have also studied the issue carefully. *See* City of Fresno City Manager's Office, *Report to Council on AT&T / MediaOne Merger — Open Access* (May 11, 2000); King County Expert Review Panel, *Applying a Policy of Non-Discriminatory Access to High-Speed Internet Access Over Cable in King County, Washington* (Oct. 1999); City of Los Angeles Info. Tech. Agency, *Broadband Access Report* ("*Los Angeles Report*") (June 1999); Sacramento Metro. Cable Tele. Comm'n, *Cable Modem and Internet Services — Open Net / Forced Access* (Nov. 4, 1999); County of San Diego Cable Tele. Review Comm'n Staff, *Broadband Internet Open Access Report and Recommendations* (Sept. 13, 1999); City and County of San Francisco Dep't of Telecommun. and Info. Services, *Open Access Report* ("*San Francisco Report*") (Jan. 14, 2000). With the exception of San Francisco and Los Angeles, all of the local franchising authorities adopted recommendations

mine a regulatory classification for, or to regulate, cable modem service on an industry-wide basis.[10]

3. Following the Second 706 Inquiry, the Commission concluded that it should address the regulatory classification of cable modem service and released the Notice of Inquiry ("Notice") in this proceeding.[11] We have since

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not to impose an access requirement at this time. The *San Francisco Report* recommended a multiple ISP access requirement, but the recommendation was subsequently abandoned by the San Francisco Board of Supervisors following the Ninth Circuit's *Portland* decision. *See* City and County of San Francisco Reply Comments at 3-4; CCTA Reply Comments at 7; *AT&T Corp. v. City of Portland* (*"Portland"*), 216 F.3d 871 (9th Cir. 2000), *reversing* 43 F. Supp. 2d 1146 (D. Ore. 1999). The Los Angeles City Council passed a resolution directing the Los Angeles City Attorney to urge the federal government to adopt an access requirement for all cable operators nationwide despite the *Los Angeles Report's* recommendation not to impose an access requirement at the time it was released. *See* Letter from Edward J. Perez, City of Los Angeles, to Magalie Roman Salas, Secretary, FCC, (Mar. 13, 2001). *See also FTC AOL Time Warner Merger Order, supra* note 8; *United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Final Judgment (D.D.C., filed May 25, 2000), *available at* http://www.usdoj.gov/atr/cases/ f4800/4841.htm (visited Jan. 24, 2002).

[10] *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report (*"Second 706 Report"*), 15 FCC Rcd 20913, 20918 ¶ 8 (2000); *First 706 Report*; 14 FCC Rcd at 2402 ¶¶ 6-7 (both reports finding that deployment of advanced telecommunications capability on the whole appears reasonable and timely). *See also National Cable & Telecommun. Ass'n v. Gulf Power Co.*, 122 S. Ct. 782, 788 (2002) (*"Gulf Power"*) (noting "that the FCC . . . has not yet categorized Internet service.").

[11] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry (*"Notice"*), 15 FCC Rcd 19287 (2000).

received over 250 filings, and Commission staff have met with a variety of industry representatives, consumer advocates, and state and local government officials.

4. In considering the issues before us we are guided by several overarching principles. First, consistent with statutory mandates, the Commission's primary policy goal is to "encourage the ubiquitous availability of broadband to all Americans."[12] Section 706 of the Telecommunications Act of 1996 ("1996 Act")[13] charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "regulatory forbearance, measures that promote competition . . . , or other regulating methods that remove barriers to infrastructure investment."[14] Moreover, consistent with section 230(b)(2) of the Act, we seek "to preserve the vibrant and competitive free market that presently exists for the Internet and other in-

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[12] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking (*"Wireline Broadband NPRM"*) ¶ 3 (rel. Feb. 15, 2002).

[13] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

[14] *See* Pub. L. No. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157 ("Section 706"). Section 706 defines "advanced telecommunications capability" "without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." *Id.* We have noted that our definition of "advanced telecommunications capability" will evolve over time. *See First 706 Report*, 14 FCC Rcd at 2407-08 ¶ 25; *Second 706 Report*, 15 FCC Rcd at 20921 ¶ 14.

teractive computer services, unfettered by Federal or State regulation."[15]

5. Second, we believe "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[16] In this regard, we seek to remove regulatory uncertainty that in itself may discourage investment and innovation. And we consider how best to limit unnecessary and unduly burdensome regulatory costs.

6. Third, in this proceeding, as well as in a related proceeding concerning broadband access to the Internet over domestic wireline facilities,[17] we seek to create a rational framework for the regulation of competing services that are provided via different technologies and network architectures. We recognize that residential high-speed access to the Internet is evolving over multiple electronic platforms, including wireline, cable, terrestrial wireless and satellite. By promoting development and deployment of multiple platforms, we promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met. We strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms.

7. For the reasons discussed below, we conclude that cable modem service, as it is currently offered, is properly classified as an interstate information service, not as a cable service, and that there is no separate offering of telecommunications service. In addition, we initiate a rulemaking proceeding to determine the scope of the

[15] *See* Communications Act § 230(b)(2), 47 U.S.C. § 230(b)(2).

[16] *See Wireline Broadband NPRM*, *supra* note 12, ¶ 5.

[17] *See id.*, *supra* note 12.

Commission's jurisdiction to regulate cable modem service and whether (and, if so, how) cable modem service should be regulated under the law, in light of the principles discussed above.

8. We seek comment on the regulatory implications of our finding that cable modem service is an information service, including, among other things, the extent to which state and local authorities may regulate the service. We are initiating a further proceeding in order to obtain additional comment on specific issues and to ensure that any action we take reflects the continuing evolution of cable modem service and the business of residential high-speed Internet access service.

II. BACKGROUND

9. *Deployment*. As of September 2001, 50.5% of U.S. households had Internet connections.[18] The vast majority of them subscribe to "narrowband" service provided over local telephone facilities.[19] Residential high-speed, or

[18] NTIA & Economics and Statistics Administration, US Department of Commerce, *A Nation Online: How Americans are Expanding Their Use of the Internet*, Feb. 5, 2002, at 5; *see also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Third Report ("*Third 706 Report*"), FCC 02-33 (rel. Feb. 6, 2002) ¶ 63.

[19] We use the term "narrowband" here to refer to Internet access service that is designed to operate at speeds of less than 200 kilobits-per-second ("Kbps") in both directions. *See Second 706 Report*, 15 FCC Rcd 20913, 20917 ¶¶ 8, 10, 12; *see also Third 706 Report*, FCC 02-33, ¶¶ 7, 9, and 11. The most common form of narrowband Internet access service is provided over traditional telephone lines (also known as "dial-up"), which currently allows for the transfer of data at speeds up to 56 Kbps. *See FCC AOL Time Warner Merger Order*, 16 FCC Rcd 6547, 6551 ¶ 8, n.11.

"broadband,"[20] Internet access service became available after narrowband Internet access service had achieved widespread popularity.[21] Residential high-speed Internet access services are provided primarily over coaxial cable wires in the form of cable modem service offered by cable operators, and over copper wires in the form of digital subscriber line ("DSL") services offered by local exchange carriers ("LECs").[22] The services are also provided to some extent over terrestrial wireless radio spectrum by mobile and fixed wireless providers and over satellite radio spectrum by satellite providers.[23] Industry analysts estimate that high-speed Internet access service is now available to approximately 75-80% of all the homes in the United States via DSL or cable modem service, and approximately 11% of all households subscribe to these services today.[24] While there are several types of high-

[20] *See Wireline Broadband NPRM*, *supra* note 12, ¶ 1 n.2; *supra* note 14.

[21] Residential Internet access services are discussed more fully in the *FCC AOL Time Warner Merger Order*. *See FCC AOL Time Warner Merger Order*, 16 FCC Rcd 6547, 6568, 6571-74 ¶¶ 53, 62-67.

[22] *See Third 706 Report*, FCC 02-33, ¶¶ 21-24.

[23] *See Second 706 Report*, 15 FCC Rcd 20913, 20922, 20928-38, 20942-43 ¶¶ 16, 29-59, 71-72; *see also Third 706 Report*, FCC 02-33, ¶¶ 24-26.

[24] *See* Morgan Stanley Dean Witter and Yankee Group Study, July 2001; Information Technology Association of America, *Building a Positive, Competitive Broadband Agenda: Positively Broadband*, White Paper (Oct., 2001) at http:// www.postivelybroadband.org (visited Dec. 20, 2001); *Morgan Stanley July 2001* Report, at 46; *Third 706 Report*, FCC 02-33, ¶ 61. Availability figures are based on the availability of wireline services (cable and DSL). Satellite is available to any household with a clear southern view, but is subject to propagation delay (delay in the transmission of signals that results from the time it takes the signals to travel between the satellites and earth sta-

speed access (DSL, cable, satellite, fixed wireless), not every home has access to every type of service.[25] Throughout the brief history of the residential broadband business, cable modem service has been the most widely subscribed to technology, with industry analysts estimating that approximately 68% of residential broadband subscribers today use cable modem service.[26] Analysts estimate that about 29% of residential broadband subscribers use DSL service,[27] and about 3% of subscribers use various

tions or the end user), and is available at a higher cost than wireline services. The Commission estimates that as of June 30, 2001, about 7.8 million households subscribed to high-speed services. *Third 706 Report*, FCC 02-33, ¶ 7.

[25] As a result of its Form 477 survey, the Commission has found that in 20.3% of zip codes in the U.S., there are subscribers to only one high-speed access provider, and 22.2% of zip codes have no subscribers to high-speed access providers at all. *Third 706 Report*, FCC 02-33, Appendix C, Table 9. These data, based on the latest Form 477 survey, measured the presence of at least one subscriber to high-speed access providers, not the actual availability of such providers. Thus multiple high-speed access providers may be available in a much higher percentage of zip codes, but not have any subscribers in those zip codes. In addition this survey did not measure the number of subscribers in each zip code. Therefore, these figures do not measure the distribution of population in these zip codes, but it is likely that more high-speed access providers are available in areas with higher population densities. *See Second 706 Report*, 15 FCC Rcd 20913, 20994-21003 ¶¶ 213-243; *see also Third 706 Report*, FCC 02-33, ¶¶ 17-26.

[26] *See* Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections (December 21, 2001)*, CABLE DATACOM NEWS, at http:// www.cabledatacomnews.com/cmic/cmic16.html (visited Jan. 23, 2002).

[27] *Id.* Generally, unless we state otherwise, our references to "DSL" throughout this Order refer to asymmetric DSL ("ADSL"). Asymmetric DSL is the most common variant of DSL used by residential subscribers, and is available at various speeds ranging up to

radio-based technologies.[27] In the past year, some incumbent LECs have scaled back their DSL deployment plans; cable's lead over DSL has grown; and several incumbent LECs and cable operators have raised their prices for high-speed Internet access services.[29]

10. *Features and Applications*. Cable modem service typically includes many and sometimes all of the functions made available through dial-up Internet access service,[30] including content,[31] e-mail accounts,[32] access to news

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6.1 mbps downstream and 640 Kbps upstream. *See Second 706 Report*, 15 FCC Rcd 20913, 20930, 20934 ¶¶ 36, 47. Currently, at lowest cost, ADSL service usually provides transmission at 384-640 Kbps downstream and 90-128 Kbps upstream.

[28] Kagan World Media, *MMDS Sub Base*, Broadband Fixed Wireless, Sept. 30, 2001, at 4; *2-Way Satellite Internet Access Poised For Growth*, COMM. DAILY, Jan. 11, 2002.

[29] *See* Stephen Lawson, IDG News Service, *SBC Pares Back Its DSL Efforts*, PCWORLD.COM, Oct. 23, 2001, at http://www.pcworld.com /news/article/0,aid, 67606,00.asp (visited Jan. 23, 2002); Kinetic Strategies, Inc., *Broadband Providers Boost Prices: Verizon, BellSouth and EarthLink Join SBC in Raising Consumer DSL Prices, AT&T and Charter Lift Cable Modem Rates*, CABLE DATACOM NEWS, June 1, 2001, at http://www.cabledatacomnews.com/jun01/jun01-5.html (visited Jan. 23, 2002). While SBC has scaled back its efforts to deploy DSL, Bell South continues to advance its deployment efforts successfully. COMM. DAILY, Jan 10, 2002, at 14.

[30] *See* Letter from Alexandra M. Wilson, Chief Policy Counsel, Cox Communications, Inc., to W. Kenneth Ferree, Chief, Cable Services Bureau, FCC, at 4-5, transmitted by letter from To-Quyen Truong, Counsel for Cox Communications, Inc., to Magalie Roman Salas, Secretary, FCC (Aug. 15, 2001) ("Cox Aug. 15, 2001 Ex Parte").

[31] *See Bova v. Cox Communications, Inc.*, Cox Communications, Inc. and CoxCom, Inc., Statement of Facts, Civil Action No. 7:01 CV 00090 (W.D. Va.) (filed Sept. 19, 2001) ("*Bova Statement of Facts*") at 4.

groups,[33] the ability to create a personal web page,[34] and

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[32] "E-mail" or "electronic mail" refers to the transmission of electronic messages over communications networks. These messages can be entered from a keyboard or through electronic files stored on a disk. Most e-mail systems include a text editor for composing messages. A user sends the message to the recipient by specifying the recipient's domain-based address, *i.e.*, jsmith @abcd.com. Sent messages are stored in electronic mailboxes until retrieved by the recipient. *See* Webopedia, *E-mail — Definition*, at http:// www. webopedia.com/TERM/e/e_mail.html (visited Jan. 9, 2002); NEWTON'S TELECOM DICTIONARY 247 (17th ed. 2001). Simple Mail Transfer Protocol ("SMTP") is the message exchange standard for the Internet. It is familiar to most people by its addressing scheme — the user name@company.com scheme. SMTP provides the very important function of moving messages from one email server to another. It works in conjunction with Post Office Protocol ("POP"), which is a mail server protocol that provides an incoming and outgoing message server and storage system. POP receives mail and holds it in a user's post office mailbox while SMTP provides message transport services. *See* MCGRAW HILL ENCYCLOPEDIA OF NETWORKING & TELECOMMUNICATIONS 438 (2001).

[33] A "newsgroup" or "news group" is an on-line forum or discussion group whereby users view and post messages using a news reader, a computer program that connects the user to a server on the Internet that stores the posted messages for the group. Each newsgroup usually focuses on a specific topic, and newsgroups cover a vast array of topics. *See* Webopedia, *Newsgroup — Definition*, at http://www.web- opedia.com/TERM/n/newsgroup.html (visited Jan. 9, 2002). Physically, the newsgroup consists of the computer files that contain the conversation elements to the discussions currently in progress about each agreed upon topic. Cable operators or ISPs get their newsgroups from different news-feeds (or "newsfeeds"), or news sources, by transferring them over the Internet or other networks. *See* NEWTON'S TELECOM DICTIONARY 475 (17th ed. 2001).

[34] The cable modem service provider typically offers a finite amount of storage capacity on one of its local servers to host, *i.e.* store and provide access via the World Wide Web, the personal web pages of its subscribers. *See, e.g.*, Cox Aug. 15, 2001 Ex Parte; Letter from Darryl Cooper, Corporate Counsel, Excite@Home, to

the ability to retrieve information from the Internet, including access to the World Wide Web.[35] Because of the broadband capability of the cable plant, however, cable modem service subscribers can access the Internet at speeds[36] that are significantly faster than telephone dial-up service.[37] As a result of that faster access, subscribers

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Magalie Roman Salas, Secretary, FCC (Aug. 17, 2001) ("Excite@Home Aug. 17, 2001 Ex Parte"); *Bova Statement of Facts, supra* note 31, at 5.

[35] The "World Wide Web" is a system of Internet servers, *i.e.*, computers connected to the Internet, that support documents formatted in a script called HyperText Markup Language ("HTML"), which supports links to other documents, as well as graphics, audio, and video files. This means that a user can move from one document to another simply by clicking on links contained in an HTML-formatted document. Not all Internet servers are part of the World Wide Web. There are several applications called Web browsers that make it easy to access the World Wide Web; two of the most popular browsers are Netscape Navigator and Microsoft's Internet Explorer. *See* Webopedia, *World Wide Web — Definition*, at http://www.webopedia.com/TERM/ W/World_Wide_Web.html (visited Jan. 9, 2002); Letter from Betsy J. Brady, Esq., Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC (Dec. 15, 2000) ("AT&T Dec. 15, 2000 Ex Parte"), Attachment at 4.

[36] References to "speed" in this context actually refer to the transmission rates for data, *i.e.*, how many bits can be delivered per second, *e.g.*, megabits per second ("Mbps"). *See* NATIONAL ACADEMY OF SCIENCES, BROADBAND: BRINGING HOME THE BITS 65 (2002) ("*NAS Broadband Report*").

[37] *See* Comcast Reply Comments in the *2001 MVPD Competition Report*, at 7; *see also* Cox Comments at 10; *see also* Cablevision Systems Corp., *Optimum Online*, at http://www.optimumonline.com (visited Jan. 9, 2002). Under optimal conditions with DOCSIS ("Data Over Cable Service Interface Specification") 1.0, Internet access over cable infrastructure may support up to 38 Mbps downstream. Upstream channels may deliver 500 Kbps to 10 Mbps, depending on the amount of spectrum allocated and modulation technique used. However, because cable broadband network capacity is shared among us-

can often send and view content with much less transmission delay than would be possible with dial-up access, utilize more sophisticated "real-time" applications,[38] and view streaming video[39] content at a higher resolution and on a larger portion of their screens than is available via narrowband.[40] Some cable operators also provide subscribers with access to content that the operators have created or aggregated on an Intranet specifically for the bene-

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ers and because of hardware limitations, an individual cable modem subscriber may generally experience speeds from 500 Kbps to 1.5 Mbps — depending on the specific network architecture and traffic load. *See generally* Kinetic Strategies, Inc., *Overview of Cable Modem Technology and Services*, at http://www.cabledatacomnews.com/cmic/cmic1.html (visited Jan. 9, 2002). DOCSIS is an open standard for data communications involving cable modems and cable systems. *See* CableLabs, *DOCSIS Project Primer*, at http://www.cable labs.com/docsisprimer.html (visited Feb. 20, 2002).

[38] "Real time" applications, such as live voice or video communications, are those communications where there is no perceived delay in their transmission, as the communication is being received perceptively at the same time it is transmitted. *See* NEWTON'S TELECOM DICTIONARY 572 (17th ed. 2001).

[39] "Streaming video" refers to the transmission of packets over the Internet containing a video signal, which is viewable as it is transmitted and before the entire file is downloaded to the user's computer. *See* NEWTON'S TELECOM DICTIONARY 655 (17th ed. 2001). In the case of RealNetworks' streaming media, a song or video starts to play on a user's computer before the entire song or video file is downloaded. In other words, data continues to download while the song or video plays. No space is used on the user's computer's hard drive to store the song or video file. *See* MCGRAW-HILL ILLUSTRATED TELECOM DICTIONARY 824 (2nd Ed. 2000).

[40] *See, e.g.*, Road Runner, *Best of Broadband — Media Runner: Instant Videos and Breaking Headlines* at http://rrcorp.central.rr.com/vm_media_runner01.asp (describing Road Runner's "Media Runner" streaming video feature) (visited Jan. 9, 2002).

fit of their subscribers.[41] For example, cable operators sometimes provide content targeted to a specific locality, much as cable operators do in their video service offerings.[42]

11. Cable operators often include in their cable modem service offerings all of the services typically provided by Internet access providers,[43] so that subscribers usually do

[41] An "Intranet" is a private network that is the equivalent of a "private Internet" reserved for those users who have the authority and passwords to access the network. *See* NEWTON'S TELECOM DICTIONARY 366 (17th ed. 2001); *see also, e.g.*, Road Runner, *Residential Service: What is Road Runner?* at http:// rrcorp.central.rr.com/hso/-whatis.asp and *Residential Service: Features,* at http://rrcorp.central.rr.com/hso/explore_features.asp (describing Road Runner, a high-speed Internet access service) (visited Jan. 10, 2002). Intranets house applications such as databases, user publishing, search vehicles, and administrative and management tools.

[42] *See, e.g.*, Road Runner, *Residential Service: What is Road Runner?* at http://rrcorp.central.rr.com/hso/whatis.asp and *Residential Service: Features,* at http://rrcorp.central.rr.com/hso/explore_features.asp (describing Road Runner, a high-speed Internet access service) (visited Jan. 10, 2002).

[43] "Internet access providers," also referred to as ISPs, combine computer processing, information storage, protocol conversion, and routing with transmission to enable users to access Internet content and services. *See Universal Service Report*, 13 FCC Rcd at 11530 ¶ 63 n.125; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Order on Remand, 15 FCC Rcd 385 ¶ 34 (1999); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, 3691 ¶ 4 (1999); *GTE Tel. Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, CC Docket No. 98-79, Memorandum Opinion and Order ("*GTE ADSL*"), 13 FCC Rcd 22466, 22468-9 ¶ 6 (1998), *recon. denied; Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to*

not need to contract separately with another Internet access provider to obtain discrete services or applications, such as an e-mail account or connectivity to the Internet, including access to the World Wide Web.[44] Subscribers typically have "click-through" access to any and all content and services available on the Internet.[45] That is, a subscriber can access the service or content of his choice by typing in the Uniform Resource Locator ("URL")[46] of, or clicking on a hyperlink to, the desired service or content, using the web browser chosen by the subscriber or included with the subscriber's cable modem service. Accessing the services or content of entities not affiliated with the cable operator, such as those provided by an unaffiliated Internet service provider ("ISP"), however, may require the subscriber to pay those entities an additional

WorldCom, Inc., CC Docket No. 97-211, Report and Order, 13 FCC Rcd 18025, 18104-05 ¶ 143 (1998). We recognize that this construction of the term ISP may become outdated as business models evolve. We do not intend to suggest that cable modem service providers, or other entities that provide services that go beyond those described above, could not be considered to be ISPs.

[44] *See, e.g.*, Road Runner, *Residential Service: What is Road Runner?* at http://rrcorp.central.rr.com/hso/whatis.asp and *Residential Service: Features,* at http://rrcorp.central.rr.com/hso/explore_features.asp (describing Road Runner, a high-speed Internet access service) (visited Jan. 10, 2002).

[45] *See FCC AOL Time Warner Order*, 16 FCC Rcd at 6594 ¶¶ 105-106. We are not aware of any cable operator that prevents subscribers from reaching the content of their choice.

[46] A Uniform Resource Locator ("URL") "is the global address for documents and other resources on the World Wide Web. The first part of the address indicates what protocol to use, *i.e.*, http, and the second part specifies the IP address or the domain name where the resource is located," *i.e.*, fcc.gov. *See* Webopedia, *URL Definition*, at http://www.webopedia.com/TERM/U/URL.html (visited Jan. 10, 2002).

fee over and above the monthly subscription charge for cable modem service.[47]

12. *Network Architecture and Technology*. Cable systems were originally built to provide video programming in one direction, from the network to subscribers.[48] These systems were designed to send the same content, a package of video channels, in an analog signal format to all subscribers uniformly. Cable operators have had to invest in major improvements or system upgrades to provide cable modem service.[49] The typical upgrade employs what is commonly known as a hybrid fiber-coaxial ("HFC") architecture.[50] The HFC architecture generally

[47] For example, AOL charges $14.95 a month for its "Bring Your Own Access" service. Yahoo! and MSN Hotmail do not charge a fee for similar services. *See* America Online, *AOL Pricing Plans*, at http://www.aol.com/info/pricing.html (visited Jan. 9, 2002); Yahoo, *Yahoo! Terms of Service*, at http://docs.yahoo.com/info/terms/ (visited Jan. 9, 2002); MSN, *Hotmail Information — Frequently Asked Questions* at http://www.msn.com (visited Jan. 9, 2002).

[48] Many cable systems had some "upstream" capability, *i.e.*, ability for the subscriber to transmit information back to the cable operator through the cable system, even before systems were upgraded to provide cable modem service, but this tended to be for simple, user-to-system messages, such as ordering pay-per-view programs. *See* CableLabs®, *DOCSIS Project Primer*, at http://www.cable-modem.com/docsisprimer.html (visited Jan. 10, 2002).

[49] Newer cable systems, such as those constructed by overbuilders, generally are designed to provide an array of services, including advanced services such as cable modem service. These systems typically are constructed to modern specifications and can provide advanced services without additional upgrades. *See generally* Letter from Charles A. Rohe and D. Anthony Mastando, Counsel, Carolina BroadBand, Inc. to Magalie Roman Salas, Secretary, FCC, WT Docket No. 99-217, CC Docket Nos. 96-98, 88-57, CS Docket No. 95-184, MM Docket No. 92-260 (May 3, 2001).

[50] *See generally NAS Broadband Report*, Appendix A at 245-55.

converts the typical cable tree-and-branch infrastructure to a ring or star-type infrastructure and increases the reliability and the overall bandwidth available for cable modem service, video programming, and other services.[51] Typically in an HFC-upgraded system, fiber optic cables are laid from the headend to neighborhood nodes.[52] Coaxial cables extend from the nodes to each subscriber's home. Cable operators allocate a portion of their system's spectrum (*i.e.*, bandwidth or channel capacity) for upstream and downstream data transmissions necessary for cable modem service.[53] At each subscriber's home, a splitter

[51] As of June 2001, many major MSOs had significantly upgraded their networks. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, Eighth Annual Report, FCC 01-389, ¶¶ 32-33 (rel. Jan. 14, 2002) ("*2001 MVPD Competition Report*").

[52] A "headend" is "the origination point for signals in the cable system. Each local service area is typically served by one or more headends. The headend has parabolic or other appropriately shaped antennas for receiving satellite-delivered program signals, high-gain directional antennas for receiving distant TV broadcast signals, directional antennas for receiving local signals, machines for playback of taped programming and commercial insertion, and studios for local origination and community access programming." *See* WALTER CICIORA AT AL., MODERN CABLE TELEVISION TECHNOLOGY 12 (1999). The headend may also house equipment to connect the cable system to the Internet. *Id.; see also* Letter from Steven N. Teplitz, Vice President and Associate General Counsel, AOL Time Warner, to Royce Sherlock, Deputy Chief, Policy and Rules Division, Cable Services Bureau, FCC (January 22, 2002) ("AOL Time Warner Jan. 22, 2002 Ex Parte") at 4-5.

[53] *See supra* note 8; *see also* Kinetic Strategies, Inc., *Overview of Cable Modem Technology and Services*, at http://www.cabledatacomnews.com/cmic/cmic1.html (visited Jan. 9, 2002); Dan Costa, *Cable: This Technology is the Simplest and Most Popular Option*, ZDNET, Dec. 14, 2001, at http://msn.zdnet.com/msn/zdnet/story/0,12461,2671130-hud00025inmn1,00.html.

and a high-speed cable modem are installed. The splitter separates signals and sends them to different cables going to the subscriber's television and computer. The cable that goes to the computer connects with a high-speed cable modem and an Ethernet or Universal Serial Bus ("USB") interface that are attached to the computer. This modem and interface enable the cable system to communicate with the subscriber's computer, and vice versa.[54]

13. Cable modem service requires special equipment at the headend and in other parts of the cable system. Often located at the headend is a Cable Modem Termination System ("CMTS"), which manages the flow of data between cable subscribers and the Internet and other equipment.[55] The CMTS enables the enhanced two-way capabilities essential for cable modem service.[56] File servers for data storage within the cable system and other types of Internet-related servers, switches, and high-speed routers that manage data flow on the Internet are often located at regional data centers.[57]

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[54] *See* Kinetic Strategies, Inc., *Transport Diagram — Home Environment*, at http://www.cabledatacomnews.com/cmic/home.html (visited Jan. 9, 2001); AOL Time Warner Jan. 22, 2002 Ex Parte at 4-5.

[55] We recognize that when a cable modem service subscriber initiates his cable modem service, the cable modem service subscriber's computer becomes a part of the Internet, *i.e.*, the network of networks and computers.

[56] *See generally* Letter from Betsy J. Brady, Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC (Dec. 18, 2001), ("AT&T Dec. 18, 2001 Ex Parte"), Attachment ("AT&T Broadband Choice Program Status") at 12-16; AOL Time Warner Jan. 22, 2002 Ex Parte at 5.

[57] "Regional data centers," sometimes referred to in whole or in part as "super headends" or "master headends," are facilities that process, store, and manage data transmitted through cable modem service. Regional data centers are located upstream of headends, in general, and may serve many headends. *See* AT&T Dec. 18, 2001 Ex Parte, Attachment at 11-16; AOL Time Warner Jan. 22, 2002 Ex Parte at 5.

14. In addition to the network improvements just described, a cable operator must establish a connection to the Internet in order to provide cable modem service.[58] Depending on network topologies and business arrangements between the cable operator and other entities, Internet connectivity to the cable plant can be accomplished by various methods, as discussed below in relation to business models. In one scenario, the cable operator provides the Internet connectivity, either by itself or in conjunction with a single affiliated or unaffiliated ISP. In a second scenario, the cable operator may offer more than one brand of cable modem service, in effect giving subscribers a choice of various ISPs. In this model, an unaffiliated ISP delivers its content and services over the cable system to subscribers through one of two different methods: (1) via the cable operator's (or affiliated ISP's) own Internet transport (backbone) arrangements, commonly referred to as "transit"; or (2) via a direct interconnection agreement between the cable operator (or affiliated ISP) and the unaffiliated ISP.[59]

15. This second method of achieving Internet connectivity in a multiple-ISP environment may require the deployment of certain additional facilities and systems depending upon the chosen technological solution, such as the installation of new routers that perform source-based

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[58] *See* AT&T Dec. 18, 2001 Ex Parte, Attachment at 9, 12-16; AOL Time Warner Jan. 22, 2002 Ex Parte at 5.

[59] *See* AT&T Dec. 15, 2000 Ex Parte, Attachment ("AT&T Broadband Choice Trial – Boulder, Colorado"); AOL Time Warner Jan. 22, 2002 Ex Parte at 5.

routing[60] or destination-based routing[61] to allow the cable operator to selectively redirect data packets to each ISP, and sufficient operations support systems ("OSS")[62] to properly maintain billing and other essential operational functions. Routing techniques, such as source-based routing, may be difficult for cable operators to manage and integrate and may present problems with regard to scalability, *i.e.*, the numbers of ISPs and subscribers that can

[60] *See* AT&T Dec. 15, 2000 Ex Parte, Attachment ("AT&T Broadband Choice Trial — Boulder, Colorado"). Source-based routing allows cable operators to determine and implement routing policies to allow or deny paths based on the identity of the source system, the application being run, the protocol in use, and the size of packets. Source-based routing provides a mechanism to label packets in order to route them to different ISPs. Source-based routing was used in the AT&T Broadband choice (multiple-ISP) trial in Boulder, Colorado, in November 2000. *See id.*

[61] *See* AOL Time Warner Jan. 22, 2002 Ex Parte at 5. Destination-based routing sends packets of information from the subscriber's PC to the cable network to locations on the Internet based on the best match of the destination address (for each packet) at each router. *See id.*; AT&T Dec. 15, 2000 Ex Parte, Attachment.

[62] *See generally* 47 C.F.R. § 51.319(g) ("Operations support system functions consist of pre-ordering, ordering, provisioning, maintenance and repair, and billing functions supported by an incumbent LEC's (local exchange carrier's) databases and information."); *Application by Bell Atlantic New York for Authorization under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, 15 FCC Rcd 3953, 3989-3990 ¶ 83 ("Incumbent LECs use a variety of systems, databases, and personnel (collectively referred to as OSS) to provide service to their customers.") We recognize that the OSS for the cable multiple-ISP context will differ in certain respects from the incumbent LEC Section 271 context. In both cases, however, the OSS includes or would include the same basic functions of pre-ordering, ordering, provisioning, maintenance, and repair functions associated with allowing unaffiliated entities, *i.e.*,, competitive LECs or ISPs, to provide service over the incumbent LEC or cable operator's facilities.

be served.[63] Cable operators may also face other technical challenges in a multiple-ISP environment, such as bandwidth management, subscriber IP address assignment management, and network security.[64] Multiple-ISP access is occurring in the marketplace and in trials however, using various routing techniques.[65]

16. Cable modem service typically requires the performance of a number of specific functions. Cable operators may self-provide all of these functions, or they may contract with affiliated or unaffiliated ISPs to provide some or all of them.[66] The functions can be categorized

[63] *See* AT&T Dec. 15, 2000 Ex Parte, Attachment; Excite@Home Aug. 17, 2001 Ex Parte, Attachment ("Multi-ISP Access Technical Landscape") at 13-23.

[64] *See* AT&T Dec. 15, 2000 Ex Parte, Attachment.

[65] *See* AOL Time Warner Jan. 22, 2002 Ex Parte at 5; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 20. In addition to source-based and destination-based routing, other possible routing techniques include Point to Point Protocol over Ethernet ("PPPoE") and Layer Two Tunneling Protocol ("L2TP") tunneling. PPPoE and L2TP are tunneling protocols that enable a Point to Point Protocol ("PPP") session between the subscriber and the specified ISP. A tunnel is a virtual dedicated connection between two points in a network. Tunneling allows data to traverse through an "intervening" network of a different protocol and works by encapsulating data from one protocol format into another protocol format. PPPoE enables PPP to run over bridged networks, and L2TP enables PPP to run over routed networks. *See* Letter from Emy Tseng, MIT, *et al.* to Magalie Roman Salas, Secretary, FCC in CS Docket No. 00-30 (May 1, 2000), Attachment at 16-17.

[66] For present purposes, we use the term "ISP" to refer to entities as described above at footnote 43, recognizing that some providers may perform services or functions in addition to those indicated. *See, e.g.*, Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 2-6.

as Internet connectivity, enhanced applications, operations, and customer service.[67]

17. Internet connectivity functions enable cable modem service subscribers to transmit data communications to and from the rest of the Internet.[68] At the most basic level, these functions include[69] establishing a physical connection between the cable system and the Internet[70] by operating or interconnecting with Internet backbone facili-

[67] For a general description of cable modem service and its underlying technology, *see* RODERICK W. SMITH, BROADBAND INTERNET CONNECTIONS, Addison-Wesley Pub. (Jan. 2002).

[68] *See generally* Letter from Marvin S. Rappaport, Vice President Public Policy, Charter Communications, to Magalie Roman Salas, Secretary, FCC (Dec. 12, 2001) ("Charter Dec. 12, 2001 Ex Parte") *passim*; Cox Aug. 15, 2001 Ex Parte at 4-5. *See supra* note 54.

[69] We recognize that not all cable operators include all of these functions in their cable modem service offerings.

[70] The common term "demarcation point" is used to define that point at which operational control or ownership of communications facilities changes from one organizational entity, *e.g.*, a cable company, to another entity, *e.g.*, an ISP. The demarcation point is used to establish a common point whereby the cable company and an ISP can separate the portion(s) of the network and its functions for which each has responsibility. This demarcation point with regard to cable modem service is usually a point within the headend and could be found on a piece of equipment where the ISP's Internet backbone trunk, *e.g.*, an OC-3, is terminated (on a switch, router or CMTS) in order to receive the hand off or transition from the cable operator's plant to the Internet. In an alternative approach, the cable company provisions its own backbone to the Internet from the headend. In this case, the demarcation point is where the cable operator's backbone from the CMTS terminates and routes to a gateway switch at an ISP's Point of Presence ("POP"), which connects to the Internet. *See generally* AT&T Dec. 18, 2001 Ex Parte, Attachment at 11.

ties.[71] In addition, these functions may include protocol conversion,[72] IP address number assignment,[73] domain name resolution through a domain name system (DNS),[74]

[71] *See generally* Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 4-6, 12; AT&T Dec. 18, 2001 Ex Parte, Attachment at 11-16.

[72] "Protocol conversion" is a data communications procedure that permits computers with different protocols or computer languages to communicate with each other. *See* NEWTON'S TELECOM DICTIONARY 553 (17th ed. 2001).

[73] *See generally* Cox Aug. 15, 2001 Ex Parte at 15-17. The Dynamic Host Configuration Protocol ("DHCP") server assigns an IP address to the cable modem so that routers connected to the Internet will recognize the location of the modem for communications to and from the Internet. IP addresses are the locating identification for computers or devices that connect to the Internet or other Transfer Control Protocol / Internet Protocol ("TCP/IP") network. "Networks using the TCP/IP protocol route messages based on the IP address of the destination. The format of an IPv4 address is a 32-bit numeric address written as four numbers separated by periods. Each number can be from zero to 255. For example, 1.160.10.240 could be an IP address." *See* Webopedia, *IP Address — Definition*, at http://www.webopedia.com/TERM/I/IP_ address.html (visited Jan. 10, 2002).

[74] *See* Cox Aug. 15, 2001 Ex Parte at 4-5 n.15; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 9, 12, 19. A DNS is an Internet service that enables the translation of domain names into IP addresses. When queried about a domain name, a DNS server provides the querier with the IP address of the domain name or the IP address of another DNS server that may provide the IP address of the domain name if the original DNS server does not how to translate a particular domain name. Thus, in effect, a DNS acts as its own network. *See* Webopedia, *DNS*, at http://www.webopedia.com/TERM/D/DNS.html (visited Feb. 19, 2002). This translation process is necessary because routing of traffic over the Internet is based on IP addresses, not domain names. As a result, before a browser can send a packet to a website, it must obtain the address for the site. *See* Webopedia *Domain Name*, at http://www.webopedia. com/TERM/D/domain_name.html (visited Jan. 10, 2002). A "domain name" is a

network security,[75] and caching.[76] Network monitoring, capacity engineering and management,[77] fault manage-

"name that identifies one or more IP addresses. For example, the domain name microsoft.com represents about a dozen IP addresses. Domain names are used in URLs to identify particular web pages." For example, in the URL http://www.fcc.gov, the domain name is fcc.gov. *Id.*; *see also* 47 U.S.C. § 1127 ("The term 'domain name' means any alphanumeric designation which is registered with or assigned by any domain name registrar, domain name registry, or other domain name registration authority as part of an electronic address on the Internet").

For more information regarding the DNS, *see* J. Postel, *IETF RFC 1591, Domain Name System Structure and Delegation* (Mar. 1994) at http://www.isi.edu/in-notes/rfc1591.txt (visited Feb. 19, 2002). Concerning the importance of the DNS to Internet access service, *see* MCGRAW HILL ENCYCLOPEDIA OF NETWORKING & TELECOMMUNICATIONS 390 ("DNS servers are strategically located on the Internet. There is usually one either directly accessible to your system or accessible over as few as one router hop, . . . Most Internet service providers have DNS servers.") (2001); *Werbach Paper* at 30 ("Internet users generally do not need to specify the IP number of the destination site, because IP numbers can be represented by alphanumeric 'domain names' such as 'fcc.gov' or 'ibm.com.' 'Domain name servers' throughout the network contain tables that cross reference these domain names with their underlying IP numbers").

[75] *See* Cablevision Systems Corp., *Cablevision Optimum Online — Privacy Policy*, at http://www.optimumonline.com/retail/r_generic/1,2994,21,00.html#7 (visited Jan. 10, 2002); Cox Aug. 15, 2001 Ex Parte at 4-5 n.15; AT&T Dec. 15, 2000 Ex Parte, Attachment ("AT&T Broadband Choice Trial — Boulder, Colorado").

[76] "Caching" is the storing of copies of content at locations in the network closer to subscribers than their original sources, i.e., data from websites, that subscribers wish to see most often in order to provide more rapid retrieval of information. *See generally* AT&T Dec. 18, 2001 Ex Parte, Attachment at 11-16; AOL Time Warner Jan. 22, 2002 Ex Parte at 5.

[77] *See generally* AT&T Dec. 18, 2001 Ex Parte, Attachment at 9; Excite@Home Aug. 17, 2001 Ex Parte, Attachment 4-6, 12. Capac-

ment,[78] and trouble-shooting[79] are Internet access service functions that are generally performed at an ISP or cable operator's Network Operations Center (NOC)[80] or back

ity engineering, planning and management, also known as configuration and performance management, refers to the ability to measure, analyze, track, and forecast consumption or use of network assets to meet and maintain Service Level Agreements ("SLAs") of consumers on the network. An SLA is an agreement between a user and a service provider defining the nature of the service provided and establishing a set of metrics to be used to measure the level of service provided measured against the agreed level of service. Such service levels might include provisioning, average availability, restoration times for outages, average and maximum periods of outage, average and maximum response times, latency, and delivery speeds. The SLA also typically establishes trouble reporting procedures, escalation procedures, and penalties for not meeting the level of service demanded — typically refunds to the users. *See* NEWTON'S TELECOM DICTIONARY 616 (17th ed. 2001). Assets include a data line's capacity (bandwidth in bits per second), ports available, and card configurations in switches and routers. Other tasks include design of network topology, sizing of backbone trunks (*e.g.*, OC-3 at 155.52 Megabits per second up to OC-192 at 9.953 Gigabits per second), routing of traffic across the network, documentation of customer network assignments (*e.g.*, device and port number, IP address, and configurations), support for troubleshooting efforts, and study/documentation of usage patterns/trends. *See id.*

[78] *See generally* Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 4-6, 12; AT&T Dec. 18, 2001 Ex Parte, Attachment at 9. "Fault management" refers to the ability to detect, isolate and correct conditions that degrade or destroy computer (hardware and software) or network functionality. *See* NEWTON'S TELECOM DICTIONARY 270 (17th ed. 2001).

[79] *See generally* AT&T Dec. 18, 2001 Ex Parte, Attachment at 9; Excite@Home Aug. 17, 2001 Ex Parte, Attachment 4-6, 12.

[80] "Network Operations Center" is a central place which monitors the status of a corporate network and sends out instructions to repair bits and pieces of the network when they break. In more formal terms, its functions include the monitoring of network status, supervi-

office and serve to provide a steady and accurate flow of information between the cable system to which the subscriber is connected and the Internet.[81]

18. Complementing the Internet access functions are Internet applications provided through cable modem service. These applications include traditional ISP services such as e-mail, access to online newsgroups, and creating or obtaining and aggregating content.[82] The cable modem service provider will also typically offer subscribers a "first screen" or "home page"[83] and the ability to create a personal web page.[84]

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sion and coordination of network maintenance, accumulation of accounting and usage data, and user support. *See* NEWTON'S TELECOM DICTIONARY 473 (17th ed. 2001).

[81] *See generally* AT&T Dec. 18, 2001 Ex Parte, Attachment at 9; Excite@Home Aug. 17, 2001 Ex Parte, Attachment 4-6, 12.

[82] *See, e.g.*, Road Runner, *Residential Service: What is Road Runner?* at http://rrcorp.central.rr.com/hso/whatis.asp and *Residential Service: Features*, at http://rrcorp.central.rr.com/hso/explore_features.asp (describing Road Runner, a high-speed Internet access service) (visited Jan. 10, 2002).

[83] In general, a "first screen" or "home page" is the screen that comes up first when the user initiates interaction with his or her cable modem service provider or ISP, for example, by clicking on the ISP's desktop icon or accessing the ISP via the World Wide Web. *See* FCC AOL Time Warner Order, 16 FCC Rcd at 6601 ¶ 126 n.360. Typically, a subscriber is able to change the first screen to the web page of his choice, although the cable operator usually provides a default first screen. *See* Christopher Stern, *Comcast to Open High-Speed Internet Network to Rival ISP*, Washington Post (Feb. 26, 2002) (indicating that Juno and NetZero customers receiving high-speed Internet service from NetZero or Juno on a Comcast cable system will be greeted by a NetZero or Juno web page when they initially launch their service).

[84] *See supra* note 34.

19. Finally, the cable modem service provider must provide practical operational and customer service functions in order for subscribers to utilize the service. The subscriber must have a computer system and a working cable modem connected via an Ethernet or USB interface to establish cable modem service.[85] As a result, the cable modem service provider may offer the installation of hardware and software in the subscriber's computer, any wiring of the subscriber's premises that may be necessary, and simple and complex customer service, as well as technical support.[86] The cable modem service provider must also develop and implement OSS in order to properly bill, provision, and manage the accounts of its subscribers.[87] Finally, cable modem service providers must

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[85] *See generally* Cox Aug. 15, 2001 Ex Parte at 4-5; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 5-6, 9; AOL Time Warner Jan. 22, 2002 Ex Parte at 4-5. With the development of the CableLabs® DOCSIS standard for modem compatibility, commercial sales of cable modems are possible. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, 24318-19 (1998). CableLabs® is a non-profit research and development organization created in 1988 by a consortium of cable operators representing North America and South America, purposed to develop new technologies for the cable industry and to serve as a clearinghouse of information regarding technological developments impacting the cable industry. *See* CableLabs®, *Fact Sheet* at http://www.cablelabs.com/about_cl/factSheet.html (visited Feb. 19, 2002).

[86] *See generally* Cox Aug. 15, 2001 Ex Parte at 4-5; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 4-6; *Bova Statement of Facts, supra* note 31, at 2-3.

[87] *See generally* Cox Aug. 15, 2001 Ex Parte at 4-5; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 4-7; *Bova Statement of Facts, supra* note 31, at 2-3; AT&T Dec. 18, 2001 Ex Parte, Attachment at 8.

provide for the sales and marketing of the service to solicit and obtain new customers.[88]

20. *Business Models*. Cable operators offer cable modem service to their customers using a variety of business models, many of which are currently under transition. Some operators self-provide, while others provide service in conjunction with affiliated or unaffiliated entities. Some operators have chosen to employ the same model throughout all of their systems nationally, while others have chosen to utilize different models in different locales. Currently, however, most MSOs only offer one brand of cable modem service on any given cable system.[89]

21. Historically, most operators have self-provided cable modem service or have provided the service in conjunction with one of several ISPs specifically created and owned by the cable operators themselves. These affiliated entities provided many of the functions of cable modem service. Excite@Home, for example, was founded by a consortium of cable operators (including TCI, Cox, and Comcast) to provide comprehensive networking and systems integration services to support cable modem service.[90] Excite@Home filed for Chapter 11 bankruptcy

[88] *See generally* AT&T Dec. 18, 2001 Ex Parte, Attachment at 8, 10.

[89] *See Morgan Stanley July 2001 Report*, at 31.

[90] The At Home Corporation ("@Home") was founded in 1995 by TCI (now AT&T) and venture capital firm Kleiner Perkins Caufield & Byers. In 1996, @Home received equity investments from Comcast Corp. and Cox Communications Inc. Canadian Multiple System Operators ("MSOs") Rogers Cablesystems Ltd., and Shaw Communications, along with Sun Microsystems, also purchased equity stakes in @Home through a private stock placement in April 1997. The company went public in July 1997, and Cablevision Systems Corp. purchased an equity stake in the venture in October 1997 in return for distribution of the @Home service in certain of its sys-

protection in September 2001 and ceased operations entirely on February 28, 2002.[91] Prior to its demise, however, it provided service to many financially affiliated and unaffiliated cable operators. Affiliated entities included AT&T (formerly TCI), Comcast, Cox, and Cablevision.[92] Unaffiliated cable operators that formed cooperative agreements with Excite@Home included Charter, Adelphia, Insight, Cogeco, MidContinent, Videon, and Medi-

tems. At Home Corp., *SEC Filing 10-K for the Year Ended December 31, 2000*, at 4; *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, 13 FCC Rcd 1034, 1066, n.150 (1998).

[91] Rachel Konrad and Alorie Gilbert, *Book Closes on Excite@Home*, CNET NEWS.COM, Feb 28, 2002, at http://story news.yahoo.com/news?tmpl=story&u=/cn/20020301/tc_cn/book_ closes_on_excite_home; At Home Corp., *Excite@Home Reduces Workforce as Operations Wind Down: Operations Expected to Cease After February 28, 2002* (press release), Dec. 14, 2001. *See infra* n.121

[92] *See* At Home Corp., *SEC Filing 10-K for the Year Ended December 31, 2000*, at 3. TCI, Cox, and Comcast were the original investors in @Home. In 1999, AT&T acquired TCI including all of its cable systems as well as its partnership in @Home. When AT&T acquired MediaOne in 2000, Media One was using Road Runner to provide cable modem service. Following the dissolution of the Road Runner partnership and the bankruptcy of Excite@Home, AT&T moved all Road Runner and @Home subscribers to its own network. *AT&T-TCI Merger Order*, 14 FCC Rcd 3160 ¶ 7; *AT&T-MediaOne Merger Order*, 15 FCC Rcd at 9831 ¶ 28; Time Warner Entertainment Co., LP, *SEC Filing 10-K for the Year Ended December 31, 2000*, at I-4; AT&T Dec. 18, 2001 Ex Parte, Attachment at 5; At Home Corp., *Excite@Home Reduces Workforce as Operations Wind Down: Operations Expected to Cease After February 28, 2002* (press release), Dec. 14, 2001; At Home Corp., *Excite@Home Provides Status of Negotiations with Cable Companies* (press release), Dec. 1, 2001.

aCom.[93] Another ISP, Road Runner, was also created by cable operators to provide many of the functions of cable modem service. Originally formed by Time Warner Cable, Road Runner later became a partnership between Time Warner and MediaOne.[94] Road Runner provided cable modem service to both operators exclusively.[95]

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[93] At Home Corp., *SEC Filing 10-K for the Year Ended December 31, 2000*, at 5.

[94] In 1996, Time Warner Cable and Time Inc. New Media formed The Road Runner Group as a separate business unit to develop and deploy high-speed cable data services. In December 1997, Time Warner and MediaOne (later acquired by AT&T) formed an alliance and merged their cable Internet operations. Time Warner Entertainment Co., LP, *SEC Filing 10-K for the Year Ended December 31, 2000*, at I-3; Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.html (visited Jan. 11, 2002); *see Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report (*"Fifth Annual Video Competition Report"*), 13 FCC Rcd 24284, 24316 ¶ 56 (1998). The Road Runner partnership has dissolved, distributing substantially all of the Road Runner assets to AOL Time Warner, which continues to offer service under the Road Runner brand name. Time Warner, Inc., *Time Warner to Increase Road Runner Ownership and Merge its Operations* (press release), Dec. 18, 2000; Time Warner Entertainment Co., LP, *SEC Filing 10-K for the Year Ended December 31, 2000*, at I-4; AOL Time Warner Jan. 22, 2002 Ex Parte at 1.

[95] Time Warner Entertainment Co., LP, *SEC Filing 10-K for the Year Ended Dec 31, 2000*, at I-3 and I-4; Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.html (visited Jan. 11, 2002); *see also Fifth Annual Video Competition Report*, 13 FCC Rcd at 24316 ¶ 56. Some Time Warner and MediaOne systems were sold to other cable operators which retained the Road Runner service. AT&T, for example, acquired Road Runner subscribers when it acquired cable operator MediaOne. However, AT&T is in the process of transitioning those subscribers to the

High-Speed Access Corp., while created independently, was subsequently acquired in part, by Vulcan Ventures, the parent company of cable operator Charter Communications.[96] Historically, High Speed Access Corp. contracted with Charter Communications and several smaller operators to provide "turn key" services, which entailed not only Internet connectivity and services such as e-mail and web-hosting, but also equipment, network management, and in some cases billing and customer service functions.[97] In 2001, however, High Speed Access Corp. filed for bankruptcy and sold substantially all of its assets

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AT&T network. AT&T Dec 18, 2001 Ex Parte, Attachment at 5. Cox also acquired Road Runner subscribers through the acquisition of certain systems, and is in the process of transitioning those subscribers to Cox's proprietary "Cox High Speed Internet" service. Cox Communications, Inc., *Cox Communications Announces Agreement to Avoid Disruption of Cox@Home Internet Service* (press release), Dec. 3, 2001.

[96] High Speed Access Corp. ("HSA") was formed in April 1998 through the merger of two cable Internet service providers: HSAnet of Littleton, Colorado and CATV.net of Louisville, Kentucky. In later years, owners included Vulcan Ventures Inc. (48.8%), Microsoft, Cisco, and Lucent. *See* Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.Html (visited Jan. 11, 2002); *see also Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, 24316 ¶ 56 (1998).

[97] High Speed Access Corp., *SEC Filing 10-Q for the Quarter Ended June 30, 2001*, at 6; High Speed Access Corp., *SEC Filing 10-K for the Year Ended December 31, 2000*, at 3-5; *see also* ACA Comments at 6-7. Some of the smaller cable operators serviced by HSA included Limestone Cable, Western Shore Cable, Genesis Cable, and Capital Cable. Kinetic Strategies, *Commercial Cable Modem Launches in North America*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic75.html (visited Jan. 11, 2002).

to Charter Communications, choosing to exit all of its turn key contracts with cable operators other than Charter.[98]

22. Excite@Home and Road Runner employed similar business and technical models. Both ISPs obtained exclusive contracts with the cable operators they served.[99] Both ISPs operated regional networks and provided operators with connections from the cable headend to the Internet, as well as content, e-mail, and web-hosting, and varying levels of network management, provisioning, and customer service.[100] Excite@Home also operated its own Internet backbone facilities.[101] In exchange for these services, cable operators typically paid Excite@Home or Road Runner a share of subscriber revenues.[102] Cable operators then combined these services of Excite@Home or Road Runner with certain other functions that they typically self-provided, including, in some cases, owning and operating the CMTS, cable modem rental, customer service administration, and cable modem installation.[103] The integrated service provided by these operators was co-branded. For example, Cox provided service under the brand Cox@Home, while Comcast provided service under the brand Comcast@Home, and Cablevision has provided service to a limited number of customers under the brand Optimum@Home.[104] AT&T has provided service under the brands AT&T@Home and AT&T Road Runner.[105]

23. Although many cable operators have traditionally entered into cooperative agreements with Excite@Home or Road Runner to provide cable modem service, some operators have chosen from the start to self-provide all of the functions included in their cable modem service offer-

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[98] Charter Communications Corp., *Charter Communications and HSA Close on Purchase Agreement* (press release), Feb. 28, 2002; Charter Communications Corp., *Charter Communications Extends Offer to HSA for Contracts and Associated Assets Serving Charter Customers* (press release), July 31, 2001. HSA Corp has commenced negotiations to exit all of its turn key contracts with cable operators other than Charter. High Speed Access Corp., *SEC Filing 10-Q for the Quarter Ended June 30, 2001*, at 6.

[99] At Home Corp., *SEC Filing 10-K for the Year Ended Dec. 31, 2000*, at 8; Time Warner Entertainment Co., LP, *SEC Filing 10-K for the Year Ended Dec. 31, 2000*, at I-3 and I-4; *see* AOL Time Warner Jan. 22, 2002 Ex Parte at 1, Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.html (visited Jan. 11, 2002).

[100] At Home Corp., *SEC Filing 10-K for the Year Ended Dec. 31, 2000*, at 8; Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.html (visited Jan. 11, 2002); Road Runner, *Company Information: What We Offer* (fact sheet), May 1999.

[101] At Home Corp., *SEC Filing 10-K for the Year Ended Dec. 31, 2000*, at 8; Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.html (visited Jan. 11, 2002).

[102] *See* At Home Corp., *SEC Filing 10-K for the Year Ended Dec. 31, 2000*, at 3-5; Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.html (visited Jan 11, 2002).

[103] Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 5-6; Road Runner, *Company Information: What We Offer* (fact sheet), May 1999.

[104] Cox Comments at 3; Comcast Reply in the *2001 MVPD Competition Report*, at 9; Cablevision Systems Corp., *SEC Filing 10-Q for the Quarter Ended March 31, 2001*, at 3; *Morgan Stanley July 2001 Report*, at 31.

[105] *See* AT&T Comments at 49; *Morgan Stanley July 2001 Report*, at 31.

ing on some, if not all, of their systems. For example, Cablevision has long provided cable modem service primarily through its self-branded, self-operated, Optimum Online service.[106] Cox and Adelphia have also provided self-branded, self-operated cable modem service in some of their systems, branded as Cox Express and Adelphia Powerlink, respectively.[107]

24. Finally, several operators have provided cable modem service in conjunction with ISPs not financially affiliated with any cable operator. Some of the smaller cable operators, for example, have historically contracted with independent ISPs, such as The ISP Channel, to obtain turn key service,[108] which entailed not only Internet connec-

[106] *See* Cablevision Systems Corp., *Optimum Online*, at http://www.optimumonline.com (visited Jan. 11, 2002); *see also Morgan Stanley July 2001 Report*, at 31. Prior to January 2002, Cablevision was providing cable modem service to a limited number of its subscribers through Optimum@Home. Cablevision Systems Corp., *SEC Filing 10-Q for the Quarter Ended March 31, 2001*, at 3; *Morgan Stanley July 2001 Report*, at 31; John Borland, *@Home Pulling Plug on Cable Partners*, CNET NEWS.COM, Jan. 10, 2002, at http://dailynews.yahoo.com/htx/cn/...ling_plug_on_cable_partners_1.html (visited Jan 31, 2002).

[107] *See* Cox Comments at 3; Adelphia Communications Corp., *SEC Filing 10-K for the Year Ended December 31, 2000*, at 4-5; *see also* http://www.adelphia.com/internet/ (visited Jan. 11, 2002); *see also Morgan Stanley July 2001 Report*, at 31. Cox is in the process of migrating its Excite@Home subscribers to self-operated "Cox High Speed Internet" service. Cox Communications, Inc., *Cox Communications Announces Agreement to Avoid Disruption of Cox@Home Internet Service* (press release), Dec. 3, 2001.

[108] *See Morgan Stanley July 2001 Report*, at 31; Letter from Emily A. Denney, Cinnamon Mueller, to Magalie Roman Salas, Secretary, FCC, (Nov. 21, 2001) ("ACA Nov. 21, 2001 Ex Parte") at 1-2; *see also* ACA Comments at 6-7; Letter from Matthew M. Polka, American Cable Association, to Anne Levine, Cable Services Bureau, (Feb. 4, 2002) ("ACA Feb. 4, 2002 Ex Parte") at 1-3.

tivity and services such as e-mail and web-hosting, but also equipment, network management, and in some cases billing and customer service functions that larger operators normally have self-provided.[109] The ISP Channel and High Speed Access Corp., however, no longer provide turn key services, and the number of turn key providers is dwindling.[110] Cable operators using independent ISPs to provide cable modem service have chosen in many cases to re-brand the service as their own or to co-brand the service. Charter Communications, for example, has contracted with EarthLink in several markets to provide cable modem service, and then rebranded the service as Charter Pipeline.[111]

25. It bears repeating that cable modem service subscribers, by "click-through" access, may obtain many functions from companies with whom the cable operator has not even a contractual relationship.[112] For example, a

[109] *See* ACA Comments at 6-7; *see also* Kinetic Strategies, Inc., *Cable Internet Service Providers and Systems Integrators*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/cmic/cmic5.html (visited Jan. 11, 2002).

[110] The ISP Channel ceased operations at the end of 2000. Jim Wagner, ISP *Channel Closes Doors at Month End*, INTERNETNEWS.Com, Dec. 11, 2000, at http://www.internetnews.com/ispnews/article/0,,8_531531,00.html (visited Jan. 11, 2002). HSA Corp has commenced negotiations to exit all of its turnkey contracts with cable operators other than Charter. High Speed Access Corp., *SEC Filing 10-Q for the Quarter Ended June 30, 2001*, at 6.

[111] *See* Charter Dec. 12, 2001 Ex Parte at 1; Charter Communications, Inc., *EarthLink and Charter Launch High-Speed Cable Internet Access Joint Service* (press release), Aug. 17, 1998.

[112] *See, e.g.*, Charter Dec. 12, 2001 Ex Parte at 1 (Charter's cable modem service allows the subscriber "to connect with any portals, web sites or any ISP that authorizes web based access. . . . Customers may select any home page, start page or ISP experience including MSN, AOL, and EarthLink without restriction unless im-

subscriber to Comcast's cable modem service may bypass that company's web browser, proprietary content, and e-mail. The subscriber is free to download and use instead, for example, a web browser from Netscape,[113] content from Fox News,[114] and e-mail in the form of Microsoft's "Hotmail."[115] Whether the subscriber chooses to utilize functions offered by his cable modem service provider or obtain them from another source, these functions currently are all included in the standard cable modem service offering.

26. Many of the business models described above are currently under transition, due to several noteworthy events. First, AOL Time Warner, Comcast, and AT&T have all embarked on a multiple-ISP approach to offering cable-modem service. Time Warner began offering a choice of provider after Road Runner's exclusivity with Time Warner was terminated on December 31, 2000 in conjunction with its merger with AOL, and in accordance with conditions imposed on the merger by the FTC.[116]

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posed by ISPs that do not support web based access."); Cox Aug. 15, 2001 Ex Parte at 5 ("Cox's cable modem service provides subscribers with a variety of enhanced functions including . . . access to other ISPs through the web . . .").

[113] *See* Netscape, *Do More Online With Netscape 6.2*, at http://www.netscape.com/computing/download/index.html?cp+hophb2 (visited Jan. 22, 2002).

[114] *See* Fox News Channel, at http://www.foxnews.com (visited Jan. 18, 2002)

[115] *See* MSN Hotmail, at http://lc2.law13.hotmail.passport.com/-cgi-bin/login (visited Jan. 18, 2002).

[116] AOL Time Warner Jan. 22, 2002 Ex Parte at 1; Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000; *FTC AOL Time Warner Merger Order*, *supra* note 8; Federal Trade Commission Office of Public Affairs, *FTC Approves AOL/Time Warner Merger with Conditions* (press release), Dec. 14, 2000 (describing FTC action); *Joint America Online / Time Warner Statement on Federal Trade Commission's Favorable Vote on Their Merger* (press release), Dec. 14, 2000. Time Warner terminated its exclusive agreement with Road Runner so that Time Warner could offer multiple ISPs on its cable systems, including AOL, earlier than if it had waited for the exclusive agreement to expire by its original terms. Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000.

As of January 2002 AOL Time Warner was offering cable modem service using both affiliated and unaffiliated ISPs on all systems in its 20 largest divisions with a choice of three national ISP services.[117] In March, AOL Time Warner added four more markets.[118] On February 26,

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[117] AOL Time Warner Jan. 22, 2002 Ex Parte at 1. The three services are: America Online, Road Runner, and EarthLink. AOL Time Warner has also entered into agreements with other national and regional ISPs, which, upon approval by the Federal Trade Commission, will allow AOL Time Warner to offer consumers additional ISP choice in each division. AOL Time Warner Jan. 22, 2002 Ex Parte at 2. On December 21, 2001, the FTC approved agreements with four ISPs: New York Connect.Net, Ltd., Internet Junction Corp., Inter.net US Ltd., and STIC.NET, and on February 26, 2002, the FTC approved agreements with five more ISPs: West Central Ohio LLC, LocalNet Corp., Gloabal Systems, Inc., Big Net Holdings, Inc., and Digital Communications Networks, Inc. Letter from Donald S. Clark, Secretary, Federal Trade Commission, to Robert D. Joffe, Counsel, Cravath, Swaine & Moore, (Dec. 21, 2001) (Approving Motions for Approval of Non-Affiliated ISP and Alternative Cable Broadband ISP Service Agreement in Connection with Four ISPs); Letter from Donald S. Clark, Secretary, Federal Trade Commission, to Robert D. Joffe, Counsel, Cravath, Swaine & Moore, (Feb. 26, 2002) (Approving Motions for Approval of Non-Affiliated ISP and Alternative Cable Broadband ISP Service Agreement in Connection with Five ISPs).

[118] *See* AOL Time Warner, *Worldwide AOL Membership Surpasses 34 Million* (press release), Mar. 12, 2002. On March 12, 2002, AOL Time Warner announced the rollout of its AOL High-Speed Broadband service in four additional markets. By FTC Order,

2002, Comcast announced that it had negotiated an agreement to offer United Online's NetZero and Juno high-speed Internet services to Comcast customers in two major metropolitan areas, within 90 days of the agreement.[119] On March 12, 2002, AT&T announced an agreement to offer EarthLink high-speed cable Internet

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AOL Time Warner must make available to subscribers at least one unaffiliated ISP on Time Warner's cable systems before AOL itself begins offering service, and must allow two other unaffiliated ISPs onto its cable systems within 90 days after AOL's commencement of service. *FTC AOL Time Warner Merger Order;* Federal Trade Commission Office of Public Affairs, *FTC Approves AOL/Time Warner Merger with Conditions* (press release), Dec. 14, 2000 (describing FTC action); *Joint America Online / Time Warner Statement on Federal Trade Commission's Favorable Vote on Their Merger* (press release), Dec. 14, 2000.

[119] Comcast Corp., *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002. The first two markets are Nashville, Tennessee and Indianapolis, Indiana. The agreement also provides a template for a subsequent national rollout of United Online's Internet service to anyone who can get Comcast Cable. *Id.* Comcast has also reached a conditional agreement with Microsoft to provide MSN ISP service on non-discriminatory terms pending conclusion of certain provisions of Comcast's proposed merger with AT&T. Comcast Corp., *SEC Filing PREM14A*, Feb. 11, 2002, at V-20 to V-21; AT&T Comcast Corp., *SEC Filing S-4*, Feb. 11, 2002, (containing Exchange Agreement dated as of Dec. 7, 2001, between Microsoft Corp. and Comcast Corp). Comcast began its ISP choice effort with a proposed trial of multiple ISP service, in which it proposed to offer Juno Express and EarthLink over its cable systems in a trial in the Philadelphia area. That trial did not occur. Comcast Corp., *Comcast and Juno Announce Multiple ISP Trial* (press release), Nov. 29, 2000; *EarthLink, Comcast and EarthLink Announce Technical Trial of High-Speed Cable-Based Internet Service* (press release), Mar. 27, 2001; *see* Comcast Comments at 37-38; *See also* Comcast Reply Comments at 16-17.

service to its consumers in the greater Boston and Seattle markets.[120]

27. Second, as noted above, in September 2001, Excite@Home filed for Chapter 11 bankruptcy protection, and was forced to liquidate its assets to pay its creditors.[121] As a result many of the nation's largest cable operators, including AT&T, Cox, Comcast, Insight and Charter were forced either to self-provide all of the functions necessary to offer cable modem service in the regions in which they had used Excite@Home, or to adopt alternative business and technical models.[122] As a result

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[120] AT&T Broadband, *AT&T Broadband and EarthLink Forge ISP Choice Agreement* (press release), Mar. 12, 2002. AT&T and EarthLink anticipate launching EarthLink's service in additional cities in 2003. *Id.* AT&T was the first MSO to conduct a multiple-ISP trial, which it launched in Boulder, Colorado on November 1, 2000. The first phase of the trial, which concluded on May 1, 2001, was designed to test technical and operational issues, and involved 300 subscribers and four ISPs. AT&T conducted a second phase from June 15 to August 15, 2001 to test billing, customer usage and customer care tools. AT&T had planned to roll out service in the Boston, Massachusetts area in 2001, but its plans were interrupted by ongoing negotiations among the participating ISPs, and the demise of Excite@Home. AT&T later announced that it plans to deploy multiple-ISP service commercially in several major markets by mid-2002. Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC (Feb. 28, 2001); *See also* AT&T Comments at 60-64, and AT&T Reply Comments at 11-15; AT&T Dec. 18, 2001 Ex Parte, Attachment at 3 and 4.

[121] At Home Corp., *Excite@Home Reduces Workforce as Operations Wind Down: Operations Expected to Cease After February 28, 2002* (press release), Dec. 14, 2001; At Home Corp., *Excite@Home Provides Status of Negotiations with Cable Companies* (press release), Dec. 1, 2001.

[122] Due to Excite@Home's bankruptcy, contracts between AT&T and Excite@Home were terminated on December 1, 2001. AT&T now self-provides all of the equipment and functions necessary to

of the termination of its relationship with Excite@Home, for example, AT&T constructed a new network to enable it to self-provide cable modem service to subscribers.[123]

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serve its cable modem subscribers. Cox, Comcast, Insight, and Charter all reached an agreement with Excite@Home that allowed them to maintain Internet access service with Excite@Home until February 28, 2002 while they transitioned the subscribers to their own high-speed network. At the time of @Home's bankruptcy, Cablevision Systems Corp. was still providing cable modem service under the Optimum@Home brand, though it had already substantially shifted to the self-provisioning model of cable modem service. On January 10, 2002, @Home cut all service to Cablevision's remaining @Home subscribers. AT&T Broadband, *AT&T Moves More Than Half of its Internet Customers to New High-Speed Network* (press release), Dec. 4, 2001; AT&T Dec. 18, 2001 Ex Parte, Attachment at 5; At Home Corp., *Excite@Home Provides Status of Negotiations with Cable Companies* (press release), Dec. 1, 2001; Cox Communications, Inc., *Cox Communications Announces Agreement to Avoid Disruption of Cox@Home Internet Service* (press release), Dec. 3, 2001; Comcast Corp., *Comcast Unveils High-Speed Internet Network Plans; Gains Final Approval For Excite@Home Agreement* (press release), Dec. 11, 2001; Karen Brown, *Insight Girds for Excite@Home Transition*, MULTICHANNEL NEWS ONLINE, Jan. 29, 2002, at http://www.tvinsite.com/index.asp?layout=story&articleId=CA194108&pubdate=01/29/2002&stt=001&display=searchResults (visited Mar. 13, 2002); Cablevision Systems Corp., *SEC Filing 10-Q for the Quarter Ended March 31, 2001*, at 3; John Borland, *@Home Pulling Plug on Cable Partners*, CNET NEWS.COM, Jan. 10, 2002, at http://dailynews.yahoo.com/htx/cn/...ling_plug_on_cable_partners_1.html (visited Jan. 31, 2002); *E@H Fallout: Charter*, CABLEFAX DAILY, Dec. 7, 2002, at 1.

[123] AT&T Dec. 18, 2001 Ex Parte, Attachment at 3 ("New network designed to optimize open access"), 4 (listing required enhancements, including Service Agent modifications and network "upgrade to include scaleable policy based routing solution"). AT&T has stated that the new network is designed to enable multiple ISP service and that it is capable of doing so on a commercial basis once certain enhancements are added. *Id.*

28. Finally, other MSOs, have been conducting or have announced that they will conduct technical trials to determine how cable modem service can be offered using multiple ISPs, as AOL Time Warner is now doing, and AT&T and Comcast propose they will do. Cox and Charter both announced technical trials of multiple ISP service. While Cox began a technical trial of multiple ISP-service with AOL and EarthLink in the third quarter of 2001, Charter has since decided not to pursue a multiple ISP trial.[124]

29. As discussed above, the multiple-ISP environment requires a re-thinking of many technical, operational, and financial issues, including implementation of routing techniques to accommodate multiple ISPs,[125] Quality of Service,[126] and the compensation, billing, and customer ser-

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[124] Cox Communications, Inc., *Cox Communications and EarthLink Agree to High-Speed Cable-Based Internet Service Trial* (press release), Apr. 24, 2001; Cox Communications, Inc., *Cox, AOL and EarthLink Launch High-Speed Service Trial* (press release), Nov. 6, 2001; *see* Charter Dec. 12, 2001 Ex Parte at 1. Cox's six-month trial is taking place in its El Dorado, Arkansas, system with 50 subscribers. *Cox Communications, Inc., Cox, AOL and EarthLink Launch High-Speed Service Trial* (press release), Nov. 6, 2001.

[125] AT&T Dec. 18, 2001 Ex Parte, Attachment at 11. While routing techniques are not new technologies, especially with regard to the Internet, they are new to cable operators, as the operators have not used the routing techniques in this fashion before.

[126] The IP-based data transmission of cable modem service, with a connectionless, "best effort" delivery model, does not guarantee the delivery of packets in any specific order, in a timely manner, or at all. In order to deploy real time applications over IP networks with an acceptable level of quality, certain bandwidth, latency, and jitter requirements, known as Quality of Service ("QoS"), must be guaranteed and met in a fashion that allows multimedia traffic to coexist with traditional data traffic on the same network. Applications such as video streaming, IP telephony, and video-conferencing are ex-

vice arrangements between the cable operator and the ISPs.[127] While much more could be said regarding these issues, it is clear that they center around the difficulties of trying to modify a service designed to be provisioned by a single cable modem service provider to allow the provisioning of cable modem service by multiple service providers.

30. *Conclusion*. As the foregoing description makes clear, the business relationships among cable operators and ISPs and their offerings to consumers are still evolving through negotiations and commercial decisions. Customers, for their part, are still learning the capabilities of cable modem service and deciding which applications they prefer. As we address the issues raised in this proceeding, we are mindful that the broadband market in general and cable modem services in particular are still evolving and that regulatory decisions will affect their development. We anticipate that further developments in this market will inform our consideration of the issues presented in the

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tremely bandwidth-and delay-sensitive, imposing unique QoS demands on the underlying network that carry them. *See* NEWTON'S TELECOM DICTIONARY 562 (17th Ed. 2001). QoS guarantees network bandwidth and availability for applications. Any real time media stream that crosses a DOCSIS cable modem-compatible access link needs to be given prioritized traffic management treatment in order to assure the best user-perceived quality end-to-end. DOCSIS 1.1 provides several potential methods for classifying traffic and several access-link traffic management functions, which could be applied to the traffic of unaffiliated ISPs to provide and improve QoS. *See* Glossary-DOCSIS 1.1 at http://www.cablelabs.com/news_room/glossary2.html (visited Dec. 18, 2001).

[127] *See* AT&T Comments at 54-66; NCTA Comments at 69-76; Excite@Home Aug. 17, 2001 Ex Parte, Attachment; AT&T Dec. 18, 2001 Ex Parte, Attachment at 5, 6, 8, 9, 11-16.

Notice of Proposed Rulemaking that we are initiating herein.

III. DECLARATORY RULING: STATUTORY CLASSIFICATION OF CABLE MODEM SERVICE

A. Background

31. In the Notice, we raised questions about the appropriate legal and policy framework for cable modem service.[128] Cable modem service, for purposes of this proceeding, is a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access.[129] Parties advocate several different legal classifications for cable modem service, including "cable service,"[130] "information service,"[131] both cable service and information service,[132] a combination of "telecommunications service"[133] and information service,[134] and "advanced telecommunications

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[128] *Notice*, 15 FCC Rcd at 19293 ¶ 15.

[129] We do not consider here other Internet-based services that cable operators may offer, such as service on virtual private networks ("VPNs"). VPNs provide the capability to send and receive data between two computers as though they are connected with a dedicated private line (point-to-point link), even though they are using the shared resources of the Internet. Regis Bates and Donald Gregory, VOICE AND DATA COMMUNICATIONS HANDBOOK at 440 (McGraw-Hill 2001). *See also* NEWTON'S TELECOM DICTIONARY 751-52 (17th Ed. 2001).

[130] *See* Communications Act § 602(6), 47 U.S.C. § 522(6), and Comcast Comments at 16-18.

[131] *See* Communications Act § 3(20), 47 U.S.C. § 153(20), and SBC/BellSouth Comments at 12-18.

[132] *See* Cox Comments at 28-30.

[133] *See* Communications Act § 3(46), 47 U.S.C. § 153(46).

capability."[135] In advocating their positions, the parties rely to varying degrees on statutory definitions, on the components and functions that make up cable modem service, on the fundamental policies stated in the Act, and on past Commission decisions.

32. The Communications Act does not clearly indicate how cable modem service should be classified or regulated; the relevant statutory provisions do not yield easy or obvious answers to the questions at hand; and the case law interpreting those provisions is extensive and complex. The technologies and business models used to provide cable modem service are also complex and are still evolving. As the Supreme Court recently observed in connection with the Commission's interpretation of the

[134] Verizon Reply Comments at 18-19.

[135] *See* AT&T Comments at 29-30; Competition Policy Institute Comments at 10. *See also* ACA Comments at 15 ("advanced service"). We note at the outset that no party to this proceeding asserts, and no court has held, that cable modem service as we use that term is a telecommunications service and nothing more. Even the commenters that approach this position acknowledge that the service contains additional elements that go beyond the statutory definition of telecommunications service. *See* Competitive Access Coalition Comments at 10; Matthew P. Lampe Comments ¶¶ 3-4 (citing content); New Hampshire ISP Ass'n Comments ¶¶ 18, 19, 23.3, 24.1 (noting existence of session, presentation, and application, information services and programming services); Verizon Comments at 10-11 (noting content). EarthLink defines the term "cable modem service" in its Comments to mean "the underlying facilities-based transmission service that is necessary to provide the information service commonly referred to as 'Internet access.'" EarthLink Reply Comments at 9. Here, we are defining the term "cable modem service" to mean the complete retail offering that is provided to subscribers. *See infra* para 38. EarthLink concludes that cable modem service, as it defines that term, is a telecommunications service. EarthLink Reply Comments at 10.

Pole Attachment Act and its application to cable modem service, "the subject matter here is technical, complex, and dynamic; and, as a general rule, agencies have authority to fill gaps where statutes are silent."[136]

33. In accordance with that responsibility, we herein address the classification of cable modem service for purposes of the Act. Our analysis begins, as always, with the language of the statute. We then consider the factual record in this proceeding, and particularly the descriptions by cable operators and others of how cable modem service is provided today and what functions it makes available to subscribers and to ISPs. We conclude that cable modem service as currently provided is an interstate information service, not a cable service, and that there is no separate telecommunications service offering to subscribers or ISPs.

B. "Information Service" or "Telecommunications Service" Classification

34. Because the classification of cable modem service turns on statutory interpretation, we begin with a review of relevant statutory definitions. The 1996 Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used."[137] "Telecommunications" is defined in turn as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received."[138]

[136] *Gulf Power*, 122 S. Ct. at 783-84, *citing Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

[137] Communications Act § 3(46), 47 U.S.C. § 153(46).

[138] Communications Act § 3(43), 47 U.S.C. § 153(43).

The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."[139]

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[139] Communications Act § 3(20), 47 U.S.C. § 153(20). The term "information service" follows from a distinction the Commission drew in the *First, Second, and Third Computer Inquiries ("Computer Inquiries")*. *See generally Regulatory and Policy Problems Presented by the Interdependence of Computer and Communications Services and Facilities*, Docket No. 16979, Final Decision and Order, 28 F.C.C. 2d 267 (1971), *aff'd in part sub nom. GTE Service Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1973), *decision on remand*, Order, 40 F.C.C. 2d 293 (1973); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry) ("Computer II Final Decision")*, CC Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980), *on reconsideration*, Memorandum Opinion and Order, 84 F.C.C. 2d 50 (1980) and Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C. 2d 512 (1981), *aff'd sub nom. Computer and Commun. Indus. Ass'n v FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983); *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, CC Docket No. 85-229, Report and Order, Memorandum Opinion and Order on Further Reconsideration, 104 F.C.C. 2d 958 (1986), *on reconsideration*, Memorandum Opinion and Order on Reconsideration, 2 FCC Rcd 3035 (1987), Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1135 (1988) *and* Memorandum Opinion and Order on Further Reconsideration and Second Further Reconsideration, 4 FCC Rcd 5927 (1989), *vacated in part, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); Report and Order, 2 FCC Rcd 3072 (1987), *on reconsideration*, Memorandum Opinion and Order on Reconsideration, 3 FCC Rcd 1150 (1988), *vacated in part, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990); *Computer III Remand Proceedings*, Report and Order, 5 FCC Rcd 7719 (1990), *on reconsideration*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 909 (1992), *petitions for review denied, California v. FCC*, 4 F.3d 1505 (9th Cir. 1993); *Computer III Remand Proceedings; Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (1991), *vacated in part and remanded, California v. FCC*, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995); *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Review — Review of Computer III and ONA Safeguards and Requirements*, CC Docket Nos. 95-20, 98-10; Further *Notice of Proposed Rulemaking*, Report and Order, 13 FCC Rcd 6040 (1998), Report and Order, 14 FCC Rcd 4289 (1999), *on reconsideration*, Order, 14 FCC Rcd 21628 (1999).

35. None of the foregoing statutory definitions rests on the particular types of facilities used. Rather, each rests on the function that is made available.[140] Accordingly,

These decisions drew a distinction between bottleneck common carrier facilities and services for the transmission or movement of information on the one hand and, on the other, the use of computer processing applications to act on the content, code, protocol, or other aspects of the subscriber's information. The latter are "enhanced" or information services. This distinction was incorporated into the Modification of Final Judgment ("MFJ"), which governed the Bell Operating Companies after the Bell System Break-Up, and into the 1996 Act. *Universal Service Report* 13 FCC Rcd at 11536 ¶ 75 (1998), citing *United States v. Western Electric Co.*, 673 F. Supp. 525 (D.D.C. 1987), *and* 714 F. Supp. 1 (D.D.C. 1988), *rev'd in part*, 900 F.2d 283 (D.C. Cir. 1990). The Commission has confirmed that the two terms — enhanced services and information services — should be interpreted to extend to the same functions. *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, as amended, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking (*"Non-Accounting Safeguards Order"*), 11 FCC Rcd 21905, 21955-56 ¶ 102.

[140] *Universal Service Report*, 13 FCC Rcd at 11530 ¶ 59 (noting "Congress's direction that the classification of a provider should not depend on the type of facilities used . . . [but] rather on the nature of the service being offered to consumers.").

we examine below the functions that cable modem service makes available to its end users. The Commission's prior analysis regarding Internet access service informs our analysis.

36. In the *Universal Service Report*, the Commission found that Internet access service is appropriately classified as an information service, because the provider offers a single, integrated service, Internet access, to the subscriber. The service combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications.[141] In the *Universal Service Report*, the Commission concluded that "Internet access providers do not offer subscribers separate services — electronic mail, Web browsing, and others — that should be deemed to have separate legal status."[142] Rather, the Commission examined specific uses of Internet access in order "to understand the nature of the functionality that an Internet access provider offers."[143]

37. The *Universal Service Report* provides several specific examples of functions that Internet access service providers typically include in their service, including e-mail, newsgroups, and the ability to create a web page that is accessible by other Internet users.[144] In addition,

[141] *See id.*, 13 FCC Rcd at 11536 ¶ 73 (1998). The *Universal Service Report* advised Congress about the implementation of certain provisions of the 1996 Act concerning the universal service system. It focused in part on the relationship between universal service and the explosive growth of Internet-based information services. The report specifically reserved the question of the statutory classification of cable modem service. *Id.* at 11535 n.140.

[142] *See id.*, 13 FCC Rcd at 11537 ¶ 75.

[143] *See id.*

[144] *See id.*, 13 FCC Rcd at 11537-39 ¶ 76-78.

Internet Access service generally includes using the DNS.[145] The DNS is an online data retrieval and directory service. The DNS is a distributed system, where the data may be replicated in multiple, geographically dispersed server systems. The administration of the DNS is hierarchical, and is routinely delegated among a great many independent organizations. It is most commonly used to provide an IP address associated with the domain name (such as www.fcc.gov) of a computer; however, the DNS is also routinely used to perform reverse address-to-name lookups[146] and to identify and locate e-mail servers.[147] In addition, the DNS is flexible and can be en-

[145] For a description of the DNS, *see supra* note 74.

[146] This is accomplished by the IETF RFC #1035, *Domain Names — Implementation and Specification*, § 3.5 at 21 ("IN-ADDR.ARPA domain") (Nov. 1987). The Commission has previously found that simple reverse directory service constitutes an enhanced or information service. *US West Communications, Inc., Petition for Computer III Waiver*, Order, 11 FCC Rcd 1195, 1199 ¶ 28 (Chief, Common Carrier Bur. 1995) ("The *NATA Centrex Order* concluded that the provision of access to a data base for purposes other than to obtain the information necessary to place a call will generally be found to be an enhanced service. The presumption regarding such services, therefore, is that they are enhanced unless they are shown to be otherwise.").

[147] Cox has described some of the functions of the DNS with respect to how it is used in Cox's cable modem service offering. *See Bova Statement of Facts, supra* note 31, at 5 (describing Cox cable modem service as follows: "When subscribers seek to send an e-mail message, the domain name system ('DNS') server . . . provides the fully-qualified host name and Internet Protocol ('IP') address of the mail server serving the subscribers."), 6 (same: "The CoxCom cable Internet service provides IP address translation to subscribers as an integral part of the provision of the foregoing services [access to the Internet, content created or aggregated by CoxCom, storage or 'caching' of popular content or information, Internet newsgroups, web hosting services, and electronic mail]. . . . CoxCom's cable Internet

hanced, so that it is capable of supporting new functionality.[148] The DNS constitutes a general purpose information processing and retrieval capability that facilitates the use of the Internet in many ways.

38. E-mail, newsgroups, the ability for the user to create a web page that is accessible by other Internet users, and the DNS are applications that are commonly associated with Internet access service.[149] Each of these applications encompasses the capability for "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[150] Taken together, they constitute an information service, as defined in the Act. Consistent with the analysis in the *Universal Service Report*, we conclude that the classification of cable modem service turns on the nature

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service stores on its dedicated DNS servers, and allows subscribers to access and use, domain name resolution information, other Internet host information and programming that translates these commonly used domain names into IP addresses to enable routing. . . . *Without this service, Internet access would be impractical for most users.*" (italics added)).

[148] Examples of the extensibility of the Domain Name System include the IETF RFC #2915 *The Naming Authority Pointer (NAPTR) DNS Resource Record* (Sept. 2000); and IETF RFC #2916, *E. 164 number and DNS* (Sept. 2000).

[149] *See* 47 U.S.C. § 231(e)(4) (defining the term "Internet access service" to include various functions); *Universal Service Report*, 13 FCC Rcd at 11537 ¶ 76 ("Internet access providers typically provide their subscribers with the ability to run a variety of applications, including World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others." (footnotes omitted)).

[150] *See* Communications Act § 3(20), 47 U.S.C. § 153(20). Information services do not implement "the management, control, or operation of a telecommunications system or the management of a telecommunications service."

of the functions that the end user is offered. We find that cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications.[151] As currently provisioned, cable modem service supports such functions as e-mail, newsgroups, maintenance of the user's World Wide Web presence, and the DNS.[152] Accordingly, we find that cable modem service,

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[151] *See* AT&T Comments at 21-23; AT&T Reply Comments at 13-14, 33-39; Cox Aug. 15, 2001 Ex Parte at 4-5 n.15.

[152] *See* AT&T Dec. 18, 2001 Ex Parte, Attachment at 7 (describing behavior of subscribers to AT&T Broadband as including e-mails, web surfing) 9 ("AT&T Broadband . . . Provides DNS . . . "); Letter from Emily A. Denney, Esq., of Cinnamon Mueller, counsel for ACA, to Ms. Magalie Roman Salas, Secretary, FCC (Jan. 30, 2001) ("BELD Jan. 30, 2002 Ex Parte") at 1 (describing the cable modem service of the Braintree, Massachusetts, Electric Light Board as follows: "BELD provides its customers information services including email, web hosting, and the BELD homepage, which includes local news, . . ."); *Bova Statement of Facts, supra* note 31, at 7 ("Enhanced functions such as . . . DNS functions must be performed by CoxCom to enable the subscriber to transmit or receive any information using the cable modem platform to or from anywhere. . . . The current cable modem architecture requires CoxCom to perform these functions as an integral part of its network." (underlining in original)); Charter Dec. 12, 2001 Ex Parte at 1 ("We have provided at no additional charge web hosting, e-mail, caching, web browser, news server, IP addressing, DNS address translation, . . . security and other functions for accessing or using the Internet."); Cox Aug. 15 2001 Ex Parte at 5 ("Cox's cable modem service provides subscribers with a variety of enhanced functions including subscriber browsing and retrieval of files from the World Wide Web, access to other Internet service providers through the Web, use of electronic mail, and access to and interaction with online newsgroups. In addition, . . . the Cox cable modem service provides the subscriber with content such as news, . . . Cox also provides the subscriber with the abil-

an Internet access service, is an information service. This is so regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting,[153] and regardless of whether every cable modem service provider offers each function that could be included in the service. As currently provisioned, cable modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.

39. Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service.[154] Consistent with the statu-

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ity to customize his or her welcome page . . . and the ability to create 'homepages' . . .").

[153] In this regard we note that some cable modem service users may choose not to use the e-mail or webhosting, for example, that is provided with their cable modem service. Nearly every cable modem service subscriber, however, accesses the DNS that is provided as part of the service. *See Bova Statement of Facts*, *supra* note 31, at 5-7 (listing all the popular applications that use DNS).

[154] Several commenters, for example, appear to claim that there is within cable modem service, as currently offered to retail subscribers, a distinct "telecommunications service," such as the transmission of data over the cable system between the subscriber and the headend, separate from the web surfing, e-mail, and other functions that comprise cable modem service. *See, e.g.*, ASCENT Comments at 13; OpenNET Comments at 19; WorldCom Comments at 10-11; WorldCom Reply Comments at 12-19. As noted above, *supra* note 135, EarthLink defines the term "cable modem service" in its Comments to mean "the underlying facilities-based transmission service that is necessary to provide the information service commonly referred to as 'Internet access'" and concludes that cable modem service, as EarthLink defines it, is a telecommunications service. EarthLink Reply

tory definition of information service, cable modem service provides the capabilities described above "via telecommunications."[155] That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.[156]

40. As stated above, the Act distinguishes "telecommunications" from "telecommunications service." The Commission has previously recognized that "[a]ll information services require the use of telecommunications to connect customers to the computers or other processors that are capable of generating,[157] storing, or manipulating information." Although the transmission of information to and from these computers may constitute "telecommunications," that transmission is not necessarily a separate "telecommunications service."[158] We are not aware of

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Comments at 9-10. As we have just found, no such separate and distinct service is being offered now.

[155] *See* 47 U.S.C. § 153(20).

[156] *See Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Order on Remand ("*Non-Accounting Safeguards Remand*"), 16 FCC Rcd 9751, 9770 ¶ 36 (2001).

[157] *See id.*, 16 FCC Rcd at 9751 ¶ 16, 9758-59 ¶ 32 (stating that some parties' "argument ignores the Act's distinction between 'telecommunications' and 'telecommunications service.' . . . [I]nformation service providers as such are not providing 'telecommunications service' under the Act, and thus are not subject to common carrier regulation."), 9769 ¶ 34 (2001).

[158] *See Non-Accounting Safeguards Remand*, 16 FCC Rcd at 9755 ¶ 8 (stating that the categories of "telecommunications service" and "information service" are "mutually exclusive"); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order ("*Universal Service Order*"), 12 FCC Rcd 8776, 9179-80 ¶¶ 788-90

any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public, or to such classes of users as to be effectively available directly to the public.[159] Further, as we discuss below, there is no Commission requirement that such an offering be made.

41. In the *Universal Service Report*, the Commission concluded that the Act's "information service" and "telecommunications service" definitions establish mutually exclusive categories of service: "when an entity offers transmission incorporating the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' . . . it offers an 'information service' even though it uses telecommunications to do so."[160] The report did not decide the statutory classification issue in those cases where an ISP provides an information service over its own transmission facilities. The *Universal Service Report* noted that "[o]ne could argue that in such a case the Internet service provider is furnishing raw transmission capacity to itself."[161] In the case of cable modem service, we do not believe that the fact that cable modem service is provided over the cable operator's own facilities, without more, necessarily creates a telecommunications service separate and apart from the cable modem service. The cable operator providing cable modem service over its own facilities, as described in the record, is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service.[162] Our analysis, like the relevant statutory definitions, focuses instead on the single, integrated information service that the subscriber to cable modem service receives and the nature of the relationships among cable operators and the entities with which they cooperate to provide cable modem service, which is discussed further below.

(1997) (stating that information services are not inherently telecommunications services simply because they are offered via telecommunications).

[159] *See* Communications Act § 3(46), 47 U.S.C. § 153(46).

[160] *See Universal Service Report*, 13 FCC Rcd at 11520 ¶ 39. *See also Non-Accounting Safeguards Remand*, 16 FCC Rcd at 9770 ¶ 36.

[161] *See Universal Service Report*, 13 FCC Rcd at 11534 ¶ 69.

42. *Computer II Requirements*. EarthLink argues that it is irrelevant whether cable operators in fact offer transmission service on a stand-alone basis.[163] Instead, EarthLink contends that cable modem service providers must create a stand-alone transmission service and offer it to ISPs and other information service providers on a tariffed basis pursuant to the Commission's *Computer II* requirements.[164] EarthLink maintains *Computer II* applies to cable modem service because cable operators offer it on an indiscriminate and standardized basis to the public and because they do so using their own facilities.[165] Accord-

[162] *See id.*, 13 FCC Rcd at 11521 ¶ 41 (stating that "[w]hen an entity offers subscribers the 'capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information via telecommunications,' it does not *provide* telecommunications; it is *using* telecommunications.") (italics added).

[163] *See* Letter from John W. Butler, Counsel for EarthLink, Inc., to Kenneth W. Ferree, Chief, Cable Services Bureau, FCC (Nov. 8, 2001), transmitted by letter from John W. Butler, Counsel for EarthLink, Inc., to Magalie Roman Salas, Secretary, FCC (Nov. 8, 2001), ("EarthLink Nov. 8, 2001 Ex Parte") at 9-10.

[164] *Id.* at 6. *See also supra* note 139.

[165] EarthLink Nov. 8, 2001 Ex Parte at 2 (stating that it is "quite clear that where an entity uses its own transmission facilities to provide an information service to the public, that entity is required as a

ing to EarthLink, "[t]he reality is that information services can only be provided to the public over a common carrier telecommunications facility."[166] In support of its arguments, EarthLink points to a line of decisions in which the Commission has required common carriers that provide information services to offer the underlying telecommunications as a stand-alone service.[167]

43. These decisions are inapposite. In the cases relied upon by EarthLink and others, the providers of the information services in question were traditional wireline common carriers providing telecommunications services (*e.g.*, telephony) separate from their provision of information services.[168] *Computer II* required those common carriers also to offer on a stand-alone basis the transport underlying that information service. The Commission has never before applied *Computer II* to information services provided over cable facilities. Indeed, for more than twenty years, *Computer II* obligations have been applied exclusively to traditional wireline services and facilities.[169] We decline to extend *Computer II* here. As we have found above, cable modem service providers currently offer subscribers an integrated combination of transmission and the other components of cable modem service.[170] EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.

44. EarthLink further contends that the fact that some cable operators offer local exchange service as competitive LECs in some markets "using the same cable facilities that are at issue in this proceeding" establishes that these cable operators are common carriers and therefore must abide by the requirements of *Computer II* with respect to their offerings of cable modem service.[171] EarthLink as-

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condition of being allowed to provide information services to make its transmission facilities available to other information service providers"). *See* EarthLink Reply Comments at 36-38 (concluding that cable operators offer cable modem service indiscriminately to the public).

[166] EarthLink Nov. 8, 2001 Ex Parte at 3.

[167] *See, e.g.*, EarthLink Comments at 22-23, 29-30; EarthLink Reply Comments at 31. *See also* WorldCom Comments at 14; WorldCom Reply Comments at 18. The cases these commenters principally rely on are *Non-Accounting Safeguards*, 16 FCC Rcd at 9771 ¶ 38; *Independent Data Commun. Mfgrs. Ass'n, Inc. Petition for Declaratory Ruling That AT&T's InterSpan Frame Relay Service Is a Basic Service; and AT&T Petition for Declaratory Ruling That All IXCs be Subject to the Commission's Decision on the IDCMA Petition*, Memorandum Opinion and Order DA 95-2190 ("*Frame Relay*"), 10 FCC Rcd 13717, 13722 ¶ 40 (Chief, Common Carrier Bur. 1995); and the *Computer Inquiries*, *supra* note 139.

[168] *See, e.g.*, *Frame Relay*, *supra* note 167; *Computer Inquiries*, *supra* note 139. *But see* EarthLink Nov. 8, 2001 Ex Parte at 3 n.2 (asserting that "the fact that AT&T might also have offered the frame relay service separately from the enhanced service was irrelevant to the Commission's separate treatment of the pure transmission component of the bundled service").

[169] *See, e.g.*, *Frame Relay*, *supra* note 167. By "wireline," we refer to services provided over the infrastructure of traditional telephone networks.

[170] In *Computer II*, the Commission found that enhanced service providers were not "common carriers" under the Act and therefore were not subject to regulation under Title II of the Act. *Computer II*, 77 F.C.C. 2d at 430-34 ¶¶ 120-29; *see id.* at 431-32 ¶ 123 ("to subject enhanced services to a common carrier scheme of regulation because of the presence of an indiscriminate offering to the public would negate the dynamics of computer technology in this area").

[171] EarthLink Nov. 8, 2001 Ex Parte at 7-8 (stating that by offering local exchange service over its cable facilities, "Cox has chosen freely to enter into the common carrier telecommunications business . . . Having made that choice to be a common carrier, however, both

serts that *Computer II* would require any cable operator providing telephone service to unbundle the underlying transmission capacity of its cable modem service and make it available to other information service providers. We disagree. As the Commission recently observed, "the core assumption underlying the *Computer Inquiries* was that the *telephone network* is the primary, if not exclusive, means through which information service providers can gain access to their customers."[172] The *Computer II and Computer III* proceedings thus subjected AT&T and GTE, and later the Bell Operating Companies, to certain safeguards and conditions, and imposed an unbundling obligation on other telephone companies. The Commission recently noted that "the obligations deriving from [the *Computer II* and *Computer III*] proceedings currently apply to the provision of wireline broadband Internet access services by facilities-based telephone companies.[173] As noted above, the Commission has applied these obligations only to traditional wireline services and facilities, and has never applied them to information services provided over cable facilities.

45. Even if *Computer II* were to apply, however, we waive on our own motion the requirements of *Computer II* in situations where the cable operator additionally offers local exchange service. The Commission, on its own motion or on petition, may exercise its discretion to waive such requirements on the basis of good cause shown and

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by offering 'pure' transmission and by offering information services over its own facilities, neither Cox nor any other cable company with similar offerings can now avoid the undisputed legal obligations that attach to providers of such services.").

[172] *Wireline Broadband NPRM*, *supra* note 12, ¶ 36 (italics added).

[173] *Id.* at ¶ 22.

where the particular facts would make strict compliance inconsistent with the public interest.[174] A waiver, therefore, may be appropriate if special circumstances warrant a deviation from the general rule, and if such deviation would better serve the public interest than adherence to the general rule.[175]

46. If we were to require cable operators to unbundle cable modem service merely because they also provide cable telephony service, we would in essence create an open access regime for cable Internet service applicable only to some operators. We believe it is more appropriate to examine the issue of open access on a national basis involving all those Title VI cable systems that choose to offer cable modem service, rather than to divide and treat separately those that also have a common carrier local telephony offering.

47. Also, we believe that many, if not most, such cable operators would stop offering telephony if such an offering triggered a multiple ISP access obligation for the cable modem service.[176] Because many cable operators would

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[174] *See* 47 C.F.R. § 1.3; *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[175] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[176] Cable operators have repeatedly stated that if local governments imposed multiple ISP access requirements, they would delay deployment of cable modem service and other services, apparently including local exchange service. *See, e.g.*, Jason Krause, *AT&T Cable Wins Broadband Case in Portland*, THESTANDARD.COM, June 22, 2000, available at 2000 WL 31589696; Venessa Hua, *Fight Over Open Access; Supervisor Proposes AT&T Share Cable System by End of '01*, SAN FRANCISCO EXAMINER, May 24, 2000, available at 2000 WL 6163923; K. C. Neel and Eric Glick, *GTE Whacks AT&T/Comcast with Lawsuit*, CABLE WORLD, Nov. 1, 1999, available at 1999 WL 28837464; Greg Edwards, *High-Speed Networks*

likely withdraw from the telephony market, applying *Computer II* in such circumstances would undermine the long-delayed hope of creating facilities based competition in the telephony marketplace and thereby seriously undermine the goal of the 1996 Act to open all telecommunications markets to competition.[177] It would also disserve the goal of Section 706 that we "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."[178] In light of the above, we believe that if *Computer II* were applicable, strict compliance here would be inconsistent with the public interest. Because we believe

Threaten Richmond, Va., Internet Service Providers, KNIGHT-RIDDER TRIBUNE BUSINESS NEWS: RICHMOND TIMES-DISPATCH — VIRGINIA, Oct. 29, 1999, available at 1999 WL 28703253 (stating that "[i]f they must provide such access, cable companies warn, they will be forced to delay the deployment of Internet, telephone and digital television services.") (italics added); Leslie Hillman, *Miami-Area Cable Firms Do Not Have to Open Lines to Rival Companies*, KNIGHT-RIDDER TRIBUNE BUSINESS NEWS: SUN-SENTINEL-FORT LAUDERDALE, FLORIDA, Oct. 20, 1999; Joe Estrella, *Access Advocates Say See You in St. Louis*, MULTICHANNEL NEWS, Oct. 18, 1999, available at 1999 WL 10010373 (stating that "[s]ome industry followers worried that AT&T will delay a proposed $19 million upgrade in St. Louis, [if multiple ISP access is required] thereby delaying the introduction of cable-modem service to some 55,000 customers. 'They took Portland off the top-10 list, didn't they?' one source said.").

[177] *See, e.g.*, H.R. Conf. Rep. 104-458, 1996 WL 46795 (Leg.Hist.) at *201 (Jan. 31, 1996) (stating that "in the future, the conferees anticipate that cable companies will be providing local telephone service and the BOCs ('Bell Operating Companies') will be providing cable service").

[178] *See infra* note 274.

that good cause is shown to deviate from the general requirements of *Computer II*, we decline to apply *Computer II* in the manner that EarthLink proposes.[179]

48. *Cable Operators' Relationships With ISPs-Self-Provisioning and Input Models*. We have concluded above that cable modem service does not include a stand-alone offering of telecommunications service to subscribers. Significantly, cable modem service as currently provided also does not include an offering of telecommunications service to ISPs or other information service providers. As discussed above, cable modem service is provided based on a wide variety of arrangements, some of which involve contractual relationships among cable operators and ISPs or other information service providers.[180] Based on the record before us, none of these arrangements appears to involve the offering of telecommunications to ISPs or other information service providers on a common carrier basis.

49. With the exception of AOL Time Warner, most cable operators currently provide only one brand of cable modem service on any system.[181] Among these cable operators, two models prevail; we refer to them here as the self-provisioning model and the input model. Some cable operators self-provide all of the functions that comprise

[179] We note that a companion notice of proposed rulemaking, *Wireline Broadband NPRM*, *supra* note 12, will address the broader issue of the application of *Computer II* requirements to facilities-based wireline providers of broadband Internet access services.

[180] *See supra* paras. 20-29.

[181] AOL Time Warner's recent deployment of a multiple-ISP approach to offering cable modem service is discussed in paragraphs 52-54 below.

the cable modem service offering.[182] AT&T, Comcast, and Cox, for example, have self-provided cable modem service on all of their systems since the demise of Excite@Home.[183] Others, such as Cablevision, have self-provided the functions of cable modem service since the service was first offered to subscribers.[184] In contrast, other cable operators contract with an ISP, which may or may not be affiliated with the cable operator, to provide many of the inputs needed to create the cable modem service offering.[185]

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[182] *See Bova Statement of Facts, supra* note 31, at 8 (stating that "[i]n other systems, such as Cox Express systems, CoxCom has no arrangement with At Home and obtains elements necessary to provide Internet services from other parties or supplies them itself."). *See also supra* paras. 21-23.

[183] AT&T, Cox, Comcast, and Charter have migrated (or are in the process of migrating) all of their former @Home subscribers off of Excite@Home's network to their own networks. *Cable Notes*, WARREN'S CABLE REG. MONITOR, Mar. 11, 2002; AT&T Dec. 18, 2001 Ex Parte, Attachment at 5; AT&T Broadband, *AT&T Broadband Internet Customers Successfully Moved to New High-SP* (press release), Dec. 7, 2001, *available at* http://www.attbroadband.com/services/other/pressreleases/ 2001_12_01.html (visited Feb. 19, 2002); Cox Communications, Inc., *Cox Communications Announces Agreement to Avoid Disruption of Cox@Home Internet Service* (press release), Dec. 3, 2001, *available* at http://www.cox.com/PressRoom/No%20 . . . Disruption.asp?LocalSys=& LocalSys= (visited Dec. 18, 2001); Comcast Corp., *Comcast Unveils High-Speed Internet Network Plans; Gains Final Approval For Excite@Home Agreement* (press release), Dec. 11, 2001, available at http://www.comcast.com/defaultframe.asp?section=press_room&SubSection=pr-cable_news (visited Feb 19, 2002); Charter Dec. 12, 2001 Ex Parte, at 1.

[184] *See supra* paras. 21-23.

[185] *See supra* paras. 21, 24. *See also* ACA Comments at 6-7 ("Many ACA members provide cable modem service through agreements with unaffiliated ISPs. ACA members and companies such as

50. Many of the large cable operators initially offered cable modem service using inputs provided by Excite@Home and Road Runner.[186] AOL Time Warner has used and still uses this type of input arrangement to provide cable modem service using inputs supplied by its affiliate Road Runner.[187] Some small operators also typically use input arrangements, usually in conjunction with unaffiliated ISPs or information service providers.[188] ISPs and other information service providers typically supply various types of inputs to cable operators that use this model. Excite@Home and HSA, for example, provided e-mail, caching, web-hosting, and other functions included

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HSA . . . have negotiated agreements for unaffiliated ISP access to the cable modem platform in smaller markets.") (underlining omitted); ACA Feb. 4, 2002 Ex Parte at 2 (although some unaffiliated ISPs with whom ACA members had agreements have folded, "a substantial number of ACA members continue to transact with unaffiliated ISPs"). One cable operator in northern New England, MetroCast, offers cable modem service with many inputs supplied by a regional ISP, Great Works Internet. *See* Metrocast Online, *available at* http://www.metro-castonline.com/ (visited Feb. 1, 2002) and Great Works Internet, *available at* http://www.gwi.net/ (visited Feb. 1, 2002).

[186] *See supra* paras. 21-23.

[187] Road Runner, *Company Info, available at* http://www.rr.com/rdrun/ (visited Feb. 20, 2002). *See also supra* para. 21. AOL Time Warner has recently begun providing cable modem service using its affiliated ISP AmericaOnline, as well as a variety of unaffiliated ISPs including EarthLink, which we discuss separately below. *See* AOL Time Warner Jan. 22, 2002 Ex Parte.

[188] *See* ACA Comments at 6-7; ACA Nov. 21, 2001 Ex Parte;; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 5-6. *See also BELD Broadband, available at* http://www.beld.net (small cable operator's cable modem service first page includes access to ten search engines, including Alta Vista, Excite, Google, HotBot, Infoseek, Lycos, WebCrawler, and Yahoo!) (visited Jan. 29, 2002).

in cable operators' cable modem service offerings.[189] ISPs also have provided cable operators with connectivity between the cable system and the Internet backbone.[190] Due to the demise of Excite@Home and HSA, some cable operators have reduced their reliance on input providers for this and other functions. Charter, for example, has recently begun self-provisioning connectivity between its systems and the Internet backbone, while continuing to rely on various input providers to supply functions such as e-mail, web-hosting, and a welcome page.[191]

51. None of the foregoing business models by which cable operators provide cable modem service appears to include the offering of any transmission service by a cable operator to an ISP or other information service provider.[192] This is necessarily true for cable operators that

[189] *See* authorities cited *supra* note 185; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 5-6.

[190] ACA Nov. 21, 2001 Ex Parte at 1; AOL Time Warner Jan 22, 2002 Ex Parte at 5; *Bova Statement of Facts*, *supra* note 31, at 2-3, 4-6; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 5-6; Road Runner, *Residential Service, Technology*, *available at* http://www.rr.com/rdrun/ (visited Feb. 20, 2002). Excite@Home operated regional networks that supplied connectivity between the cable headend and the Internet. At Home Corp., *SEC Filing 10-K for the Year-Ended Dec. 31, 2000*, at 8; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 5-6.

[191] Charter Dec. 12, 2002 Ex Parte. Charter previously contracted with Excite@Home and HSA for connectivity between any given cable system and the Internet backbone, as well as email, web-hosting, and similar functions. *Id*; Excite@Home Aug. 17, 2001 Ex Parte, Attachment at 5-6. As noted above, Cox, Comcast, and AT&T have eliminated their reliance on input providers altogether and have adopted a self-provisioning approach.

[192] As noted in paragraph 52 below, AOL Time Warner has implemented a multiple ISP business model that differs somewhat from models used by other cable operators. Moreover, as described in

self-provision all elements of cable modem service and therefore have no arrangements with ISPs. It also appears true for cable operators that provide cable modem service using input arrangements. In both the self-provisioned model and the input model, the cable operator is offering cable modem service to its retail subscribers. Even where an unaffiliated ISP provides most of the information service functions described above, as described in the record, the entity that ultimately provides cable modem service to the subscriber is the cable operator. As described in the record, the cable operator is providing its subscribers with a single service, cable modem service, not with separate transmission, e-mail, and web surfing services.[193]

52. *Cable Operators' Relationships With ISPs — Potential Private Carriage Offering*. AOL Time Warner recently has begun offering multiple brands of cable modem service to subscribers on all of its major systems pursuant to the *FTC AOL Time Warner Merger Order*.[194] Cur-

paragraph 54 below, if a cable operator's input function were a pure telecommunications offering, we conclude that, given the cable operator does not hold itself out indiscriminately to serve all ISPs, such offering would be a private carrier service.

[193] *See supra* text accompanying notes 142-143.

[194] *See* AOL Time Warner Jan. 22, 2002 Ex Parte at 1-2. AOL Time Warner notes that it adopted a multiple ISP business plan before any obligations were imposed on it by the FTC. *Id.* at 3. Other cable operators have completed or are conducting trials of multiple ISP offerings and appear to be effecting commercial deployment of multiple ISP cable modem service offerings. *See supra* paras. 26, 28. Comcast appears to be in the initial stages of implementing its own access arrangements with unaffiliated ISPs. Comcast, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002, *available at* http://www.comcast.com/press_room/viewrelease.asp?pressid=130 (visited Feb. 27, 2002); Exchange Agreement dated as of Dec. 7, 2001, between Microsoft Corp. and Comcast Corp., *available at* http://

rently AOL Time Warner offers cable modem service in conjunction with its affiliated ISPs, AOL and Road Runner, and with unaffiliated ISP EarthLink on all systems in each of its 20 largest divisions.[195] Arrangements with other unaffiliated ISPs are in various stages of development.[196] AOL Time Warner describes its arrangements with EarthLink and the unaffiliated ISPs as a kind of partnership in which "the [unaffiliated] ISP and the cable operator together offer an integrated Internet service to consumers and both retain a direct interest in providing the service to the consumer."[197] AOL Time Warner explains that "both TWC and the ISP retain a direct interest in each customer's account and share in the economics of each customer pursuant to the individually negotiated affiliation agreements."[198] According to AOL Time Warner, "both TWC and the ISP take full responsibility for the service customers receive. Thus, customers can call either TWC or the ISP to have their problems addressed."[199] Both AOL Time Warner and the ISP have

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www/sec.gov/archives/edgar/. . .0095012302001136/e56461s4ex2-6-.txyt (visited Feb. 27, 2001).

[195] AOL Time Warner Jan. 22, 2002 Ex Parte at 1-3.

[196] Time Warner Cable has entered into agreements with various national and regional ISPs. *See* AOL Time Warner Jan. 22, 2002 Ex Parte at 2-3; FTC, *Application for Approval of Non-Affiliated ISP and Alternative Cable Broadband ISP Service Agreement* (Dec. 21, 2001), *available at* http://www.ftc.gov/os/2002/02/index.htm (visited Feb. 19, 2002). The FTC has approved several of these agreements. FTC, *Application for Approval of a Non-Affiliated ISP and Alternative Cable Broadband ISP Service Agreement* Feb. 26, 2002), *available at* http://www.ftc.gov/opa/2002/02/fyi0213.htm (visited Mar. 1, 2002).

[197] AOL Time Warner Jan. 22, 2002 Ex Parte at 3.

[198] *Id.*

[199] *Id.* at 4.

the right to sell the ISP's brand of cable modem service and to set their own prices for the service.[200] Regardless of which entity markets and bills for the service, it appears that AOL Time Warner and the ISP are cooperating to provide a retail offering, and both maintain a direct customer relationship with subscribers.

53. AOL Time Warner's arrangement with EarthLink, like those with other unaffiliated ISPs, represents a cooperative arrangement between AOL Time Warner and the ISP, in which the two entities together are providing a service at retail to subscribers.[201] Although this arrangement differs in some respects from the input model described above, in that the ISP has the opportunity to establish a direct relationship with the subscriber, it is the same in that subscribers receive a single service, cable modem service, and that neither AOL Time Warner nor any ISP is offering subscribers a separate telecommunications service.[202]

54. It is possible, however, that when EarthLink or other unaffiliated ISPs offer service to cable modem subscribers, they receive from AOL Time Warner an "input" that is a stand-alone transmission service, making the ISP an end-user of "telecommunications," as that term is defined in the Act. The record does not contain sufficient facts by which to make that determination.[203] To the ex-

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[200] *Id.*

[201] *See* NCTA Comments at 48, 50 (predicting in December 2000 that cable operators would, in the future, "enter into commercially reasonable agreements with unaffiliated ISPs"; explaining then-current "coordinated efforts by the cable operator and the [affiliated] Internet service [provider]").

[202] *See id.* at 18.

[203] No commenter claims that AOL Time Warner is providing any telecommunications or information service offering to an ISP.

tent that AOL Time Warner is providing a stand-alone telecommunications offering to EarthLink or other ISPs, we conclude that the offering would be a private carrier service and not a common carrier service, because the record indicates that AOL Time Warner determines on an individual basis whether to deal with particular ISPs and on what terms to do so.[204]

55. The Commission and courts have long distinguished between common carriage[205] and private carriage by examining the particular service at issue.[206] As the

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[204] *See* AOL Time Warner Jan. 22, 2002 Ex Parte *passim*; authorities cited *infra* note 210.

[205] The Commission has repeatedly found in various contexts that the definition of "telecommunications service" under the Act is equivalent to "common carrier" service. *See, e.g., Cable & Wireless, PLC*, File No. SCL-96-005, Cable Landing License, 12 FCC Rcd 8516, 8521 ¶ 13 (1997); *AT&T Submarine Systems, Inc.*, File No. S-C-L-94-006, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21587-88 ¶ 6 (1998), *aff'd*, Virgin Islands Tel. Co. v. FCC, 198 F.3d 921 (D.C. Cir. 1999); *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 9177-78 ¶ 785 (1997), *aff'd in part, reversed in part, and remanded in part, Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. granted*, 530 U.S. 1213 (2000); Declaratory Ruling, 14 FCC Rcd 3040, 3042 ¶ 6 (1999), *remanded on other grounds, State of Iowa v. FCC*, 218 F.3d 756 (D.C. Cir. 2000). Moreover, the D.C. Circuit has held that the FCC's interpretation of "telecommunications service" as common carrier service is reasonable and permissible. *Virgin Islands Tel. Co. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999).

[206] *See National Ass'n of Reg. Utils. Comm'rs v. FCC*, 525 F.2d 630, 640 (D.C. Cir.), *cert. denied*, 425 U.S. 992 (1976) ("*NARUC I*"); *NARUC v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*"); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *AT&T Submarine Systems, Inc. Application for a License to Land and Operate a Digital Submarine Cable System Between St. Thomas and St. Croix in the U.S. Virgin Islands*, File No. S-C-L-94-006, Memorandum Opinion and Order, 13 FCC Rcd 21585, 21588-89 ¶¶ 8-9 (1998), *aff'd, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *NORLIGHT Request for Declaratory Ruling*, File No. PRB-LMMD 86-07, Declaratory Ruling, 2 FCC Rcd 132, 133 ¶ 14 (1987). *See also* Cox Comments at 45-46; NCTA Comments at 13-17.

D.C. Circuit has stated, "the primary *sine qua non* of common carrier status is a quasi-public character, which arises out of the undertaking to carry for all people indifferently."[207] In contract, an entity is a private carrier for a particular service when a carrier "chooses its clients on an individual basis and determines in each particular case 'whether and on what terms to serve' and there is no specific regulatory compulsion to serve all indifferently."[208] The record indicates that AOL Time Warner is determining on an individual basis whether to deal with particular ISPs and is in each case deciding the terms on which it will deal with any particular ISP.[209] To the extent that AOL Time Warner is making an offering of pure telecommunications to ISPs, it is dealing with each ISP on an individualized basis and is not offering any transmission service indiscriminately to all ISPs.[210] Thus, such an of-

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[207] *NARUC II*, 533 F.2d at 608-09 (quotation marks omitted). *See also* authorities cited *supra* note 206.

[208] *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *see NARUC I*, 525 F.2d at 641 ("a carrier will not be a common carrier where its practice is to make individualized decisions, in particular cases, whether and on what terms to deal").

[209] *See supra* paras. 52-54

[210] *See* AOL Time Warner Jan. 22, 2002 Ex Parte at 3 (referring to its "individually negotiated affiliation agreements" with ISPs), at 4 (suggesting that AOL Time Warner intends to exercise its discretion in choosing which ISPs participate in its multiple ISP offerings to subscribers: "TWC also believes that this partnering arrangement works best for customers because TWC is putting its reputation on

fering would be a private carrier service, not a "telecommunications service." Similarly, to the extent that other cable providers elect to provide pure telecommunications to selected clients with whom they deal on an individualized basis, we would expect their offerings to be private carrier service.

56. *AT&T v. City of Portland*. We recognize that the United States Court of Appeals for the Ninth Circuit considered issues related to the classification of cable modem service in *AT&T v. City of Portland*.[211] While we are considering the broad issue of the appropriate national framework for the regulation of cable modem service, the *Portland* court considered a much narrower issue — whether a local franchising authority, whose authority was limited to cable service, had the authority to condition its approval of a cable operator's merger on the operator's grant of multiple ISP access.[212] In that case, the court held that the cable modem service at issue, @Home, was

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the line with every ISP it sells, both in the case of affiliated ISPs like AOL, and unaffiliated ones like EarthLink."). *See also AOL Time Warner Inc., Texas Networking, Inc., Petition for Declaratory Ruling and Complaint Regarding Violations of Merger Conditions and for Enforcement of Merger Conditions*, CS Docket No. 00-30, AOL Time Warner Response and Opposition at 8 & n.22 (describing part of AOL Time Warner's multiple ISP access activities, specifically a questionnaire for ISPs "to provide [Time Warner Cable] with information to help evaluate the companies which sought to enter into agreements with TWC. It requests basic information touching on matters related to the integrity, consumer acceptability and stability of a business and the people who run it.") (filed Sept. 4, 2001).

[211] *AT&T v. City of Portland*, 216 F.3d 871 (9th Cir. 2000) ("*Portland*"), *reversing* 43 F. Supp. 2d 1146 (D. Ore. 1999).

[212] *Id.* at 875.

not a "cable service."[213] The court further concluded that:

> @Home consists of two elements: . . . To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.[214]

57. The Ninth Circuit's decision was based on a record that was less than comprehensive. The parties proceeded on the assumption that the cable modem service at issue was a cable service and therefore did not brief the regulatory classification issue.[215] Notably, the Commission, filing as *amicus curiae*, was not a party to the case and did not provide its expert opinion on this issue.[216] In contrast, the record in this proceeding, developed over the course of a year through written comments and replies and meetings with interested parties, has fully addressed the classification issue and explored the characteristics of cable modem service as it is now provided.

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[213] *Id.* at 876.

[214] *Id.* at 878.

[215] *Id.* at 876 (noting that "Portland premised its open access condition on its position that @Home is a 'cable service' governed by the franchise").

[216] *Amicus* Brief of Federal Communications Commission, *AT&T Corp. v. City of Portland*, No. 99-35609, United States Court of Appeals for the Ninth Circuit, filed Aug. 16, 1999. *See also Portland*, 216 F.3d at 876 ("We note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us. Thus, we are not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine.").

58. The Ninth Circuit could have resolved the narrow question before it by finding that cable modem service is not a cable service. Nevertheless, in the passage quoted above the court concluded that because there is a "telecommunications" component involved in providing cable modem service, a separate "telecommunications service" is also being offered within the meaning of section 3(46) of the Act.[217] As discussed in paragraph 40 above, however, under the Act telecommunications is distinct from telecommunications service. Though by definition an information service includes a telecommunications component, the mere existence of such a component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber.[218] The Ninth Circuit did not have the benefit of briefing by the parties or the Commission on this issue and the developing law in this area.[219]

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[217] *See* Communications Act § 3(46), 47 U.S.C. § 153(46).

[218] *Non-Accounting Safeguards Remand*, 16 FCC Rcd at 9755 ¶ 8 (stating that the categories of "telecommunications service" and "information service" are "mutually exclusive"); *Universal Service Order*, 12 FCC Rcd at 9179-80 ¶¶ 78-90 (stating that information services are not inherently telecommunications services simply because they are offered via telecommunications).

[219] We also note that the Ninth Circuit's determination that cable modem service was in part a telecommunications service also recognized that the Commission "has broad authority to forbear" from regulation under § 10 of the Act, 47 U.S.C. § 160. *See Portland*, 216 F.3d at 879. The United States District Court for the Southern District of California has applied the Ninth Circuit's determination that a cable operator providing Internet transmission is providing a telecommunications service and has held that that determination "mandates a deferral to the primary jurisdiction of the FCC on the enforcement of the common carrier obligations of the statute." The District Court referred specifically to the Commission's authority to forbear from regulating telecommunications services in certain circumstances. *GTE.Net LLC v. Cox Commun., Inc.*, Case No. 00-CV-2289-J (BEN), Order Granting Motion to Stay and Denying Motion to Dismiss, slip op. at 7-9 (Jan. 29, 2002). Although we do not forbear from Title II regulation (to the extent other jurisdictions seek to apply it) on this record, we do tentatively conclude that such regulation would not be appropriate and that we should forbear from it. *See infra* para. 94.

59. *Commission Authority*. Having concluded that cable modem service is an information service, we clarify that it is an interstate information service. The Commission has found that "traffic bound for information service providers (including Internet access traffic) often has an interstate component."[220] The Commission concluded that although such traffic is both interstate and intrastate in nature, it "is properly classified as interstate and it falls under the Commission's . . . jurisdiction."[221] The jurisdictional analysis rests on an end-to-end analysis, in this case on an examination of the location of the points among which cable modem service communications travel. These points are often in different states and countries.[222] Accordingly,

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[220] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98, Intercarrier Compensation for ISP-Bound Traffic, CC Docket No. 99-68*, Order on Remand and Report and Order ("*Intercarrier Compensation Order*") FCC 01-131 ¶ 52 (rel. Apr. 27, 2001), available at 2001 WL 455869, *petition for review pending, WorldCom, Inc. v. FCC*, D.C. Circuit Nos. 01-1218 *et al.*

[221] *Intercarrier Compensation Order, supra* note 220 at ¶ 52 (footnote omitted). *See also Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 543 (8th Cir. 1998) (affirming the jurisdictionally mixed nature of ISP-bound traffic); *GTE ADSL*, 13 FCC Rcd at 22466 ¶ 1 (concluding "that [GTE's ADSL service], which permits Internet Service Providers (ISPs) to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level").

[222] *See Intercarrier Compensation Order, supra* note 220, at ¶ 14 (noting longstanding rule that "the jurisdictional nature of ISP-bound

cable modem service is an interstate information service.[223]

C. "Cable Service" Classification

60. We find that cable modem service is not a "cable service" under the definition prescribed by the Act.[224] Section 602 of the Act defines "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."[225] The Act further defines "video programming" as "programming provided by, or generally considered comparable to programming provided by, a television broadcast station."[226] "Other programming service" is defined as "information that a cable operator makes available to all subscribers generally."[227] The Act states that a "cable operator" provides cable service over

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traffic should be determined, consistent with Commission precedent, by the end points of the communication") (footnote omitted); *GTE ADSL*, 13 FCC Rcd at 22478-79 ¶ 22.

[223] *See* Communications Act § 2(a); 47 U.S.C. 152(a) (granting the Commission jurisdiction over "all interstate and foreign communication by wire or radio and all interstate and foreign transmission of energy by radio, which originates and/or is received within the United States, and to all persons engaged within the United States in such communication or such transmission of energy by radio, . . ."). *See also infra* paras. 75-76 and *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995).

[224] *See* Communications Act §§ 3(7), 602(6), 47 U.S.C. §§ 153(7) and 522(6).

[225] 47 U.S.C. § 522(6).

[226] Communications Act § 602(20), 47 U.S.C. § 522(20).

[227] *Id.* § 602(14), 47 U.S.C. § 522(14).

a "cable system" it owns or manages.[228] Commenters debating whether the cable service definition applies to cable modem service focus their arguments primarily on what is meant by the terms "one-way transmission" and "other programming service" that were part of the definition as originally enacted in 1984 and the term "or use" added in 1996. We will analyze key phrases in the statutory definition.

61. *One-Way Transmission to Subscribers*. The phrase "one-way transmission to subscribers" in the definition reflects the traditional view of cable as primarily a medium of mass communication, with the same package or

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[228] *Id.* § 602(5), 47 U.S.C. § 522(5).

A "cable system" is "a facility, consisting of a set of closed transmission paths and associated . . . equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community." *Id.* § 602(7), 47 U.S.C. § 522(7). The Commission has concluded that "the term cable system as used in the Act encompasses only video delivery systems that employ cable, wire, or other physically closed or shielded transmission paths to provide service to subscribers . . . Radio services that do not use such closed transmission paths at all . . . are therefore not cable systems under the Act." *Definition of a Cable Television System*, MM Docket No. 89-35, Report and Order, 5 FCC Rcd 7638, 7638 ¶ 5 (1990), *remanded in part on other grounds sub nom. Beach Commun., Inc. v. FCC*, 959 F.2d 975 (D.C. Cir.), *further reconsidered on other grounds*, 965 F.2d 1103 (D.C. Cir. 1992), rev'd, 508 U.S. 307 (1993). Cf. H.R. Conf. Rep. No. 485, 104th Cong. 2d Sess. 113, 114, 116 (1996) ("Joint Explanatory Statement"), *reprinted in* 1996 U.S.C.C.A.N. 124, 125, 127 (using "closed transmission" to refer to a transmission medium when explaining the term "telecommunications"). We disagree with EarthLink's suggestion in its Reply Comments at 20 n.63 that the term "closed transmission paths" in this definition provides guidance in interpreting the "cable service" definition. We find no basis for concluding that the term was intended by Congress to have significance beyond describing the physical facilities of a cable system.

packages of video programming transmitted from the cable operator and available to all subscribers.[229] When the definition was enacted in 1984, cable systems designed for the traditional one-way delivery of programming were developing the capability to provide "'two-way' services, such as the transmission of voice and data traffic, and transactional services such as at-home shopping and banking."[230] The legislative history indicates that Congress intended the cable service definition "to mark the boundary between those services provided over a cable system which would be exempted from common carrier regulation under section 621(c) and all other communications services that could be provided over a cable system."[231] Thus, the definition reflected the traditional view that the one-way delivery of television programs, movies, and sporting events is not a traditional common carrier activity and should not be regulated as such.[232]

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[229] *See* H.R. Rep. No. 934, 98th Cong. 2d Sess. 22, 27 (1984) ("1984 House Report"), *reprinted in* 1984 U.S.C.C.A.N. 4655, 4659, 4664.

[230] *See* 1984 House Report at 27, 1984 U.S.C.C.A.N. at 4664.

[231] 1984 House Report at 41, 1984 U.S.C.C.A.N. at 4678.

[232] *See* Communications Act § 621(c), 47 U.S.C. § 541(c) ("Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service."); *id.* § 621(d)(2), 47 U.S.C. § 541(d)(2) ("Nothing in this title [VI] shall be construed to affect the authority of any State to regulate any cable operator to the extent that such operator provides any communication service other than cable service, whether offered on a common carrier or private contract basis."); 1984 House Report at 29, 41, 1984 U.S.C.C.A.N. at 4666, 4678. *See also* Communications Act § 624(a), 47 U.S.C. § 544(a) ("[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title [VI]").

62. The Commission has previously interpreted the term "transmission" in the cable services definition "as requiring active participation in the selection and distribution of video programming," an interpretation that the D.C. Circuit has upheld.[233] In the *Video Dialtone* proceeding, the Commission found that control over video content distinguished cable service from video dialtone service, the provision of a transparent video conduit to be used for delivering the programming of others.[234] Be-

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[233] *See Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration ("*Video Dialtone Reconsideration*"), 7 FCC Rcd 5069, 5071 ¶ 16, 5072 ¶ 18 (1992), *aff'd*, *National Cable Television Ass'n. v. FCC* ("NCTA v. FCC"), 33 F.3d 66, 73 (D.C. Cir. (1994). *See also Telephone Company-Cable Television Cross-Ownership Rules, Sections 63.54-63.58*, CC Docket No. 87-266, Memorandum Opinion and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 244, 290-91 ¶ 97 (1994) (traditional cable operators "select or provide the video programming available to subscribers"); Second Report and Order, Recommendation to Congress, and Second Further Notice of Proposed Rulemaking ("*Video Dialtone Second Report*"), 7 FCC Rcd 5781, 5817 ¶ 69 (1992) (cable operators select video programming "by owning, exercising editorial control over, or having cognizable financial interests in, video programming" and "by making decisions concerning the price of video program offerings and by bundling, packaging, and creating tiers of video programming"); 1984 House Report at 43, 1984 U.S.C.C.A.N. at 4680 (stating that the options or categories available as cable services would "be created by the cable operator or programming service provider and made generally available to all subscribers" and would be "delineated by the cable operator or the programming service provider"). The 1996 Act amendments to the Communications Act affecting video dialtone did not alter the analysis of "cable service" in the *Video Dialtone* proceeding or in *NCTA v. FCC*.

[234] *See Video Dialtone Reconsideration*, 7 FCC Rcd at 5071-72; NCTA v. FCC, 33 F.3d at 71; *see also Entertainment Connections, Inc.* ("*ECI*"), 13 FCC Rcd 14277, 14303 ¶ 55, 14311 ¶ 73 (1998),

cause the "one way transmission requirement" applies to all content in the cable services definition, operator control over the selection of content offered to subscribers is a characteristic of both video programming and other programming service provided as a cable service. We recognize, as AT&T and the National League of Cities point out, that some operators or their affiliated ISPs may themselves produce or obtain the rights to content accessible through their web sites,[235] but cable operators do not control the majority of information accessible by cable modem subscribers, as discussed further below.

63. *Other Programming Service*. The statutory definition specifies that cable service includes two types of content. One is the video programming historically transmitted by cable operators to subscribers, which is not provided today through cable modem service,[236] as commenters generally agree.[237] The other is the category of "other programming service," which the Act defines as "information that a cable operator makes available to all subscribers generally."[238] The 1984 legislative history describes "other programming service" as "non-video information" having the characteristics of traditional video programming.[239] "Other programming service" does not include information that is subscriber specific.[240]

64. *Subscriber Interaction*. While "cable service" is defined as the "one-way transmission" of video programming or other programming services, the definition specifically contemplates some subscriber interaction. The definition enacted in 1984 provided for "subscriber interaction, if any, which is required for the selection" of content, so that cable service includes subscribers' ability to select video programming and information provided in

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review denied sub nom. City of Chicago v. FCC, 199 F.3d 424 (7th Cir. 1999), *cert. denied*, 531 U.S. 825 (2000).

[235] AT&T Comments at 10-11, 14; National League of Cities Comments at 9 n.10. *See* 1984 House Report at 42, 1984 U.S.C.C.A.N. at 4679 (the cable operator need not create the content itself; "the provision of information over a cable system by a channel lessee or by the cable operator through a joint venture or other commercial arrangement would be a cable service if it met all other criteria for being a cable service"). We note that operator control is specifically limited by statute with respect to channels made available for public, educational and governmental access (section 611) and leased access (section 612), and in the conditions governing carriage of the signals of television broadcast stations (sections 614 and 615), 47 U.S.C. §§ 531, 532, 534, 535.

[236] Internet video, called "streaming video" because data are "streamed" over the Internet to provide continuous motion video, has not yet achieved television quality. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 00-132, Seventh Annual Report, 16 FCC Rcd 6005, 6054 ¶ 107 & n.379 (2001); *see also supra* note 39. Streaming video, therefore, is not consistent with the definition of video programming. Even if streaming video does achieve television quality, it would not be treated as a cable service unless it otherwise falls within the definition of "cable service."

[237] *See e.g.*, AT&T Reply Comments at 30; EarthLink Reply Comments at 15. *See generally* Internet Ventures, 15 FCC Rcd 3247 (denying access to a leased channel for Internet access service because the varied array of services comprising the service today are not limited to "video programming," the only use for which leased channels are available under section 612 of the Act, 47 U.S.C. § 532).

[238] 47 U.S.C. § 522(14).

[239] 1984 House Report at 41, 1984 U.S.C.C.A.N. at 4678.

[240] *See id.* at 41-42, 1984 U.S.C.C.A.N. at 4678-79 ("If information transmitted on a cable system is made available only to an individual subscriber or to a discrete group of subscribers, the transmission of this information is not a cable service.").

other non-video programming services.[241] The legislative history states that Congress intended "simple menu-selection" or searches of pre-sorted information from an index of keywords that would not activate a sorting program and "would not produce a subset of data individually tailored to the subscriber's request" to be cable services. On the other hand, offering the capacity to engage in transactions or off-premises data processing,[242] including unlimited keyword searches or the capacity to communicate instructions or commands to software programs stored in facilities off the subscribers' premises,[243] would not be.[244] Thus, operators offering video programming or non-video information could also offer subscribers the on-line capability to choose the content of interest to them, but not to manipulate, customize or interact with the information on-line.[245] As the Commission has held, ser-

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[241] Pub. L. No. 98-549 § 2, 98 Stat. 2779, 2780 (1984) (text of new section 602(5)(B) defining "cable service"); *see* 1984 House Report at 43, 1984 U.S.C.C.A.N. at 4680.

[242] *See* 1984 House Report at 42, 1984 U.S.C.C.A.N. at 4679 ("In general, services providing subscribers with the capacity to engage in transactions or to store, transform, forward, manipulate, or otherwise process information or data would not be cable services.").

[243] According to the legislative history, examples of software programs included computer or video games or statistical packages stored off-premises. The transmission and downloading of software programs, video games, and statistical packages to personal computers could be a cable service if the information were made available to all subscribers and not used interactively over the cable system. *Id.* at 42, 1984 U.S.C.C.A.N. at 4679.

[244] *Id.* at 42-43, 1984 U.S.C.C.A.N. at 4679-80.

[245] *See Video Dialtone Second Report*, 7 FCC Rcd at 5821 ¶ 75 (addressing the definition of "video programming" in the context of adopting video dialtone rules). Because video programming and non-video information are treated comparably in the statute, the reasoning

vices offering a high degree of interactivity, such as offering subscribers the capability for tailoring a video image to a subscriber's specific requests, would fall outside the scope of video programming under the definition of "cable service" enacted in 1984.[246]

65. "*Or Use.*" The 1996 Telecommunications Act ("1996 Act") added the words "or use" to the cable service definition, so that a cable service may now include "subscriber interaction, if any, which is required for the selection *or use*" of cable services.[247] We disagree with those cable operator and franchising authority commenters who argue that this amendment brings cable modem service within the definition of cable service.[248] The amendment itself addresses only the use of content otherwise qualifying as cable service. As the D.C. Circuit has pointed out, the subsection of the definition permitting subscriber interaction is qualified by the term "if any," implying that "subscriber interaction . . . is not a necessary component of cable service."[249] Cable service con-

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the Commission applied to "video programming" in *Video Dialtone Second Report* is applicable to non-video information as well.

[246] *Id.*

[247] Pub. L. No. 104-104 § 301(a)(1), 110 Stat. 56, 114, 47 U.S.C. § 552(6)(B) (emphasis added).

[248] *See* Comcast Comments at 17; Cox Aug. 15, 2001 Ex Parte at 7; NCTA Comments at 6; National League of Cities Comments at 9. Others argue that the amendment simply reflects the evolution of two-way video services, game channels, or program guides, but makes no fundamental change to the meaning of "cable service." *See* Texas Office of Public Utility Counsel Reply Comments at 18 ("Congress wanted to accommodate interactivity that might surround one-way video services"); OpenNET Comments at 7-8 (information received by subscribers must be available to all subscribers generally); WorldCom Reply Comments at 30.

[249] *NCTA v. FCC*, 33 F.3d at 72.

tinues to be defined as "the one-way transmission to subscribers," and both video programming and other programming services remain subject to this limitation.[250] The definition of "other programming service" continues to be "information that a cable operator makes available to all subscribers generally."[251]

66. The legislative history relied on by commenters who favor an expansive reading of the amendment does not require the result they advocate. The Joint Explanatory Statement for the 1996 Act states: "The conferees intend the amendment to reflect the evolution of cable to include interactive services such as game channels and information services made available to subscribers by the cable operator, as well as enhanced services."[252] This statement supports an intent to permit interactivity associated with both video and other programming services provided by cable operators to subscribers. If Congress in-

[250] *See* Communications Act § 602(6)(A), 47 U.S.C. § 522(6)(A).

[251] *See id.* § 602(14), 47 U.S.C. § 522(14).

[252] Joint Explanatory Statement at 169, 1996 U.S.C.C.A.N. at 182. The conferees added, "This amendment is not intended to affect Federal or State regulation of telecommunications service offered through cable system facilities, or to cause dial-up access to information services over telephone lines to be classified as a cable service." The House, whose version of the amendment was adopted in conference, had explained the addition of the term "or use" only as "reflecting the evolution of video programming toward interactive services." *Id.* at 167, 1996 U.S.C.C.A.N. at 180. Some commenters also cite Representative Dingell's remarks during the floor debates, which state that "[t]his conference agreement strengthens the ability of local governments to collect fees for the use of public right-of-way. For example, the definition of the term 'cable service' has been expanded to include game channels and other interactive services." *See* National League of Cities Comments at 6-7 (quoting 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (remarks of Rep. Dingell)).

tended by the language in the Joint Explanatory Statement to broaden the meaning of cable services to include standalone "information services" as defined in the 1996 Act or "enhanced services" as that term has traditionally been defined, the language of the statute itself does not reflect this intent.

67. In light of the statutory language itself and the ambiguities in the legislative history, we find that the addition of the term "or use" to the definition of cable service does not bring cable modem service within the definition of cable service. Rather, we believe that the one-way transmission requirement in that definition continues to require that the cable operator be in control of selecting and distributing content to subscribers and that the content be available to all subscribers generally. Based on the record before us, we find that cable modem service does not have the characteristics required for a cable service. The record shows cable modem service to be a service built around Internet access, which, among other things, allows subscribers to define searches for information throughout the World Wide Web, query web sites for information, engage in transactions, receive individually tailored responses to their requests, generate their own information, and exchange e-mail.[253] That the cable operator makes subscriber access to the Internet possible does not establish the operator's control over the selection of the infor-

[253] *See* WorldCom Comments at 10 (disputing that these types of activities are cable service); WorldCom Reply Comments at 28 (arguing that subscriber interaction is the essence of Internet service, not merely ancillary to a one-way service). *See also* EarthLink Reply Comments at 20 n.64 (stating that the AT&T Website Agreement it found at www.att.com/terms shows that AT&T does not control the information available through its cable modem service).

mation made available to subscribers via the Internet.[254] Facilitating subscriber use of the Internet by giving subscribers access to the Internet's TCP/IP protocols,[255] making commercial arrangements for connections to the Internet backbone network,[256] providing links to search engines on the home page, providing home page links to web sites that can be searched,[257] or caching frequently requested information to enhance the high-speed performance of the network,[258] does not put the Internet experience offered through the cable modem service in either the video programming or other programming service categories of cable service. These capabilities may make the subscriber's Internet experience easier, faster, and more convenient, but the ultimate control of the experience lies with the subscriber.[259] As EarthLink comments,

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[254] *See* AT&T Comments at 13; Cox Aug. 15, 2001 Ex Parte at 6-7 (advocating that providing Internet capability satisfies the requirement that the operator make the information generally available).

[255] *See* NATOA Comments at 8 n.11.

[256] *See* AT&T Comments at 16 n.22.

[257] *See id.* at 11.

[258] *See* Cox Aug. 15, 2001 Ex Parte at 7. Cox and AT&T also argue that cable modem service would be classified as "cable service" under the 1984 definition because on-line computer services were included in the "other programming service" category in the original definition. *Id.* at 6; AT&T Comments at 13. The 1984 House Report describes transmitting and downloading computer software, such as computer games or statistical packages, for use on personal computers as a cable service; on-line interactivity, such as data base searching, fell outside the definition. 1984 House Report at 42-43, 1984 U.S.C.C.A.N. at 4679-80.

[259] The FCC Local State Government Advisory Committee ("LSGAC") argues that "there is nothing inconsistent about a service being simultaneously a 'cable service' and an 'information service.' In fact — all cable services offered by a cable operator appear to be 'information services' because cable services offer 'the capability for

the majority of the information accessed over the Internet is chosen individually by the Internet user without the involvement of the cable operator or a third party with which it contracts in the creation or selection of the content.[260] Furthermore, much of the information received by the subscriber is tailored to that subscriber's interests.

68. Including proprietary information or packages of pre-selected web site links in the service does not change the classification.[261] Even if discrete parts of cable modem service have characteristics of cable service, that does not require classification of the service as a cable

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. . . making available information via telecommunications, and includes electronic publishing.'" LSGAC, Advisory Recommendation No. 26, In the Matter of Inquiry Concerning High Speed Cable Access to the Internet Over Cable and Other Facilities, GN Docket No. 00-185 (Feb. 5, 2002) ("LSGAC Advisory Recommendation No. 26"), at 1-2, transmitted by letter from Kenneth S. Fellman, Chairman, LSGAC, to Magalie Roman Salas, Secretary, FCC (Feb. 5, 2002), transmitted by letter from Elizabeth Jackson for Kenneth S. Fellman to Dr. Emily Hoffnar, FCC (Feb. 5, 2002). Even if there is an overlap between cable services and information services, however, this would not make all information services cable services. As discussed above, offering the capability for making information available does not establish that the operator controls the selection and distribution of the information and that the information is generally available as required for a cable service.

[260] EarthLink Comments at 11.

[261] *See* AT&T Comments at 10-11, 14-15; Cox Aug. 15, 2001 Ex Parte at 8 (stating that cable operators offer "a cable modem service that integrates high-speed Internet access, content, information and services"). *Compare* OpenNET Reply Comments at 9-10 (contending that customer using cable modem service does not need proprietary home page) *with* AT&T Reply Comments at 31-32 (stating that it is irrelevant that subscribers can bypass the cable operator's home page as long as the information is made available to subscribers).

service when it is predominantly Internet access.[262] NCTA points to language in the 1984 House Report stating that the regulatory classification of separate cable services and non-cable services is not affected by the packaging or marketing of such services together.[263] NCTA argues from this that the bundling of non-cable services with cable services does not contaminate the cable service or transform it into a non-cable service. The House Report language does not persuade us that the integrated cable modem service should be classified as a cable service. The House Report reflects congressional intent in 1984, expressed again in the Joint Explanatory Statement accompanying the 1996 Act,[264] that existing regulatory authority over non-communications services was not to be affected by Title VI, and it is consistent with the Commission's treatment of bundled offerings of separate telecommunications services with non-telecommunications services. Our determination that cable modem service is not a cable service does not mean that the cable operator cannot provide the service, just that the service is not subject to Title VI.

69. *Internet Tax Freedom Act*. We also are not persuaded by arguments that the Internet Tax Freedom Act, enacted more than two years after the amendment at issue, demonstrates any congressional intent regarding the regu-

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[262] *See* AT&T Comments at 14 (arguing that if any part of cable modem service can be classified as a cable service, the service in its entirety should be classified as a cable service).

[263] NCTA Reply Comments at 7 (citing 1984 House Report at 44, 1984 U.S.C.C.A.N. at 4681; *Universal Service Report*, 13 FCC Rcd at 11536, 11539 ¶¶ 75, 79).

[264] 1984 House Report at 41, 1984 U.S.C.C.A.N. at 4678; Joint Explanatory Statement at 169, 1996 U.S.C.C.A.N. at 182.

latory classification of cable modem service.[265] That statute provides for a moratorium on "taxes on Internet access, unless such tax was generally imposed and actually enforced prior to October 1, 1998."[266] The statute defines "tax" as "(i) any charge imposed by any governmental entity for the purpose of generating revenues for governmental purposes, and is not a fee imposed for a specific privilege, service, or benefit conferred; or (ii) the imposition on a seller of an obligation to collect and to remit to a governmental entity any sales or use tax imposed on a buyer by a governmental entity."[267] It specifically exempts franchise fees for cable services from the definition of taxes.[268] Los Angeles and the National League of Cities argue that this exemption would not be necessary unless Congress believed cable modem service to be a "cable service."[269] However, "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one,"[270] and as the National League of Cities acknowledges, may not be dispositive.[271] Nothing in the Internet Tax Freedom Act shows any congressional intent to address or amend the statutory definition of "cable ser-

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[265] Internet Tax Freedom Act, Pub. L. No. 105-277, Div. C, Title XI, §§ 1100-1104, 112 Stat. 2681-719 (1998), 47 U.S.C. § 151 note ("Internet Tax Freedom Act").

[266] *Id.* § 1101(a)(1).

[267] *Id.* § 1104(8)(A).

[268] *Id.* § 1104(8)(B). It also exempts fees for open video systems operating pursuant to Communications Act § 653, 47 U.S.C. § 573, and any other fee related to obligations or telecommunications carriers under the Communications Act. *Id.*

[269] *See* Los Angeles Comments at 16; National League of Cities Comments at 10-11.

[270] *United States v. Price*, 361 U.S. 304, 313 (1960).

[271] National League of Cities Comments at 10.

vice" in the Communications Act. The exemption simply makes clear that franchise fee obligations for cable services are not affected by the moratorium.

D. Other Statutory Classifications

70. A few commenters advocate other statutory classifications for cable modem service, such as "advanced telecommunications capability" as defined in section 706 of the 1996 Telecommunications Act.[272] Most cable modem service fits within our definition of advanced telecommunications capability because it affords the user the ability to send and receive information at speeds higher than 200 kbps.[273] Section 706 does not, however, impose particular obligations on providers of such capability. Accordingly, we need not consider cable modem service's status as advanced telecommunications capability in resolving the issue of statutory classification. Consistent with section 706, however, in the following Section, we seek comment on what regulatory framework will promote the deployment of cable modem service, as well as other forms of advanced telecommunications capability, to all Americans in a reasonable and timely fashion.[274]

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[272] AT&T Comments at 29-30. *See also* ACA Comments at 15 ("advanced service").

[273] *Second 706 Report*, 15 FCC Rcd at 20920 ¶ 11.

[274] Section 706 of the 1996 Act, *supra* note 14, requires that the "Commission . . . encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment."

71. Some commenters suggest that we create a category of service that would be within our general authority over "interstate and foreign commerce in communication by wire and radio."[275] Because we have found that cable modem service fits within the statutory definition of an information service, we need not consider whether we have the authority to create a new category of service.

IV. NOTICE OF PROPOSED RULEMAKING

A. Background

72. Having determined that cable modem service is an interstate information service, we now address the regulatory implications of our determination. We note that the record in the Notice contains extensive comments on the Commission's authority to regulate cable modem service, as well as the costs and benefits of imposing a multiple ISP requirement on cable operators. Nonetheless, we initiate a rulemaking proceeding to examine these issues in light of the Commission's recent initiation of the *Wireline Broadband NPRM*.[276] We also seek to further examine the scope of the Commission's jurisdiction to regulate cable modem service, including whether there are any Constitutional limitations on the exercise of that jurisdiction. Next, in light of marketplace developments, we consider whether it is necessary or appropriate at this time to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly (what we refer to hereafter as "multiple ISP access"). We also seek comment on the role of state and

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[275] SBC/BellSouth Comments at 13-24; Communications Act §§ 1, 2(a), 47 U.S.C. §§ 151, 152(a).

[276] The proceeding initiated by our Notice in GN Docket No. 00-185 is left open only to the extent that the Notice raised issues that are also raised in this notice of proposed rulemaking.

local franchising authorities in regulating cable modem service. Finally, we note the relationship between our classification decision and statutory or regulatory provisions concerning pole attachments, universal service, and the protection of subscriber privacy.

73. In considering whether regulation of cable modem service is appropriate, we are guided by the principles set forth above.[277] First and foremost, we are guided by our statutory mandates to "encourage the ubiquitous availability of broadband to all Americans."[278] Section 706 of the 1996 Act charges the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by "regulatory forbearance, measures that promote competition or other regulating methods that remove barriers to infrastructure investment."[279] Moreover, consistent with section 230(b)(2) of the Act, we seek "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[280] Second, we are mindful of the need to minimize both regulation of broadband services and regulatory uncertainty in order to promote investment and innovation in a competitive market.[281] Third, we seek to encourage facilities-based broadband competition. By promoting development and deployment of multiple platforms, we will best ensure that public demands and needs for broadband

[277] *See supra* paras. 4-6.

[278] *Wireline Broadband NPRM*, *supra* note 12, at ¶ 3.

[279] *See supra* note 14.

[280] *See* Communications Act § 230(b)(2), 47 U.S.C. § 230(b)(2).

[281] *See Wireline Broadband NPRM*, *supra* note 12, at ¶ 5.

services can be met. Fourth, we strive to develop an analytical approach that is, to the extent possible, consistent across multiple platforms.

74. *Different Models of Multiple ISP Access.* The Notice in this docket sought comment on three possible models pursuant to which a cable operator could be required to provide multiple ISP access.[282] Some commenters addressed one or more of these models.[283] Other commenters proposed different models for mandating multiple ISP access. While some proposed to rely primarily on private negotiation among cable operators and ISPs,[284]

[282] The Notice stated: "Under one open access model, no particular connecting ISP has a privileged or preferred relationship with the cable operator; rather, each ISP purchases transmission capability and customer access from the cable operator on nondiscriminatory prices, terms and conditions, and the cable operator manages the network on a nondiscriminatory basis. Under a second open access model, multiple ISPs purchase transmission capability and customer access from the cable operator on nondiscriminatory prices, terms, and conditions, but an affiliated or preferred ISP manages the network on a nondiscriminatory basis. Under a third model, multiple unaffiliated ISPs would obtain access to the cable modem platform according to agreements negotiated between those ISPs and cable operators." *Notice*, 15 FCC Rcd at 19299-300 ¶¶ 30-31.

The Notice, in the passage quoted above, assumed that multiple ISP access would involve the ISP purchasing transmission capability from the cable operator. The comments herein and recent experience suggest, however, that multiple ISP access would not necessarily involve a purchase of transmission capability.

[283] *See, e.g.*, Consumer and ISP Representatives Comments at 3, 11-14; George Mason University, Mercatus Center, Regulatory Studies Program Comments at 4-5; New Hampshire ISP Association Comments at 7.

[284] *See, e.g.*, AT&T Comments at 82; CIX Comments *passim* (advocating some oversight by the Commission); New Hampshire ISP Association Reply Comments at 2-5.

others proposed regulation comparable to that imposed on incumbent LECs' DSL service[285] or to cable operators' leased access obligations.[286] Others advocated regulation of the cable operator's facilities comparable to regulation of the unbundled network elements of incumbent LECs pursuant to section 251(c)(3).[287] Another form of multiple ISP access is provided consistent with the FTC AOL Time Warner Merger Order.[288] Therefore, we ask that parties, in their comments, specify whether they are addressing any form of multiple ISP access in particular or all the forms that have been proposed. Commenters should also consider whether any access requirement should specifically limit ISP access to uses related to the offering of cable modem service, or should explicitly permit other uses by ISPs.

B. Commission Authority

75. Federal courts have long recognized the Commission's authority to promulgate regulations to effectuate the goals and accompanying provisions of the Act in the absence of explicit regulatory authority, if the regulations are reasonably ancillary to existing Commission statutory authority.[289] This authority stems from several provisions

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[285] *See, e.g.*, Brand X Internet Comments at 3-4; LavaNet Comments at 2.

[286] *See, e.g.*, Consumer and ISP Representatives Comments at 3, 6-10; Consumers Union *et al.* Comments at 22.

[287] *See, e.g.*, ASCENT Comments at 13-18; Consumers Union *et al.* Comments at 20-22.

[288] *See supra* note 8.

[289] *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968). *See also FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979); *United States v. Midwest Video Corp.*, 406 U.S. 649 (1972) ("*Midwest Video*"); *Promotion of Competitive Networks in Local Telecommunications Markets, Wireless Commun. Ass'n Int'l, Inc., Petition to Amend Section 1.4000 of the Commission's Rules*, First Report and Order and Further Notice of Proposed Rulemaking in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-98, and Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57 ("*Competitive Networks*"), 15 FCC Rcd 22983, 23028-29 ¶ 101 and n.261 (2000).

of the Communications Act. Section 1 of the Act charges the Commission with "execut[ing] and enforc[ing] the provisions of this Act,"[290] provisions which extend "to all interstate and foreign communication by wire or radio . . . and . . . all persons engaged within the United States in such communication."[291] Moreover, section 4(i) provides that "[t]he Commission may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with the Act, as may be necessary in the execution of its functions."[292] The Commission's authority pursuant to Title I, however, is not "unrestrained" and may only be exercised provided such action is "necessary to ensure the achievement of the Commission's statutory responsibilities."[293]

76. The Commission asserted ancillary jurisdiction over information services (then called "enhanced services") in the Computer Inquiries.[294] Since then, it has

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[290] *See* Communications Act § 1, 47 U.S.C. § 151.

[291] *See* Communications Act § 2(a), 47 U.S.C. § 152(a).

[292] *See* Communications Act § 4(i), 47 U.S.C. § 154(i).

[293] *Midwest Video*, 440 U.S. at 706.

[294] *See, e.g., Computer II Final Decision*, 77 FCC2d at 432 (1980), *aff'd, Computer and Commun. Indus. Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983). *See also Non-Accounting Safeguards Order*, 11 FCC Rcd at 21955 ¶ 102

only exercised that authority in limited instances.[295] Private interstate communications services likewise fall within the Commission's subject matter jurisdiction.[296]

77. In the *Wireline Broadband NPRM*, the Commission tentatively concluded that wireline broadband Internet access service is an interstate information service.[297] Consistent with this tentative conclusion, we requested comment on the extent to which we should exercise our Title I ancillary jurisdiction to regulate the provision of wireline broadband Internet access service by incumbent local exchange carriers. Given our classification above of cable modem service as an interstate information service, we now seek comment on whether the Commission should

(1996) ("all of the services that the Commission has previously considered to be 'enhanced services' are 'information services'").

[295] *See, e.g., Competitive Networks*, 15 FCC Rcd at 23029 ¶ 102, 23042 ¶ 134 & n.318 (asserting Title I jurisdiction over customer premises antennas used for fixed wireless signals); *Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, WT Docket No. 96-198, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417, 6457 ¶ 98 (1999) (asserting Title I jurisdiction to regulate information services generally, whether provided by carriers or non-carriers, and to impose disability access rules on the offering of "voicemail and interactive menu services, and related equipment"); *Computer II Final Decision*, 77 FCC2d at 432, 461-86 (asserting Title I jurisdiction over enhanced services and imposing structural separation on AT&T provision of enhanced services).

[296] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 147 (D.C. Cir. 1994); *NARUC II*, *supra* note 206.

[297] *Wireline Broadband NPRM*, *supra* note 12.

exercise its Title I authority here with regard to the provision of cable modem service.

78. We note that in both proceedings, we are requesting comment on the extent to which we should exercise Title I authority to regulate the facilities-based provision of interstate information services. We seek comment regarding how our findings and decisions in one proceeding should impact the other. We also request comment on whether there are legal or policy reasons why we should reach different conclusions with respect to wireline broadband Internet access service and cable modem service. Should any decision to exercise Title I jurisdiction over either service be influenced by the cable operators' current status as the leading providers of residential broadband services?

79. We seek comment on any explicit statutory provisions, including expressions of congressional goals, that would be furthered by the Commission's exercise of ancillary jurisdiction over cable modem service. One possibility is the Commission's basic purpose "to make available, so far as possible, to all the people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[298] Other statutory grounds might include the goals stated in section 230(b) of the Act,[299] the

[298] *See* Communications Act § 1, 47 U.S.C. § 151.

[299] *See* Communications Act § 230(b) (1, 2) , 47 U.S.C. § 230(b) (1, 2) (including "to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

We have relied on § 230 for guidance in making many decisions. *See, e.g., FCC AOL Time Warner Merger Order*, 16 FCC Rcd at

Title VI goal of assuring "that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,"[300] and section 706 of the 1996 Act.[301] We request comment on the use of these or other statutory provisions as the basis for our exercise of Title I jurisdiction. We also request comment on whether our reliance on our ancillary jurisdiction in support of these or other provisions would be analogous to our reliance on ancillary jurisdiction in adoption of the *Computer Inquiry* rules. In addition, given the relationship of cable modem service (including the underlying transmission component) to services provided by wireline common carriers, we seek comment on whether there are any additional bases for asserting ancillary jurisdiction.

80. *The First Amendment*. Many commenters have debated whether a federally-mandated system of multiple ISP access would violate the First Amendment rights of cable operators.[302] We seek comment on this issue and, in

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6603 ¶ 128; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in Docket No. 99-68, 14 FCC Rcd 3689, 3693 ¶ 6 (1999); *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16133 ¶ 344 (1997); Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21477 ¶ 282 (1996).

[300] *See* Communications Act § 601(4), 47 U.S.C. § 521(4).

[301] *See supra* note 14.

[302] The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press . . ." U.S. Const. Amend. I. *Compare* Comcast Comments at 26; Cox Comments at 47-50; NCTA Comments at 38-39, NCTA Reply Comments at 3; Verizon Comments at 35-38 *with* Consumers Union Comments at 6-9; NATOA Comments at 18. *See also* David Wolitz, *Open Access and the First Amendment: A Critique of Comcast Cablevision of Broward County, Inc. v. Broward County*, 4 YALE SYMP. L. & TECH 6 (2001) (arguing that the First Amendment does not prohibit multiple ISP access regulations similar to those promulgated by Broward County and litigated in *Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000)); Harold Feld, *Whose Line Is It Anyway? The First Amendment and Cable Open Access*, 8 COMMLAW CONSPECTUS 23 (2000) (arguing that the First Amendment authorizes but does not require the federal government and local franchise authorities to impose multiple ISP access conditions on cable operators).

particular, on the level of First Amendment scrutiny that would apply to a federal multiple ISP access requirement. Because the record already contains comment on First Amendment Constitutional issues potentially raised by multiple ISP access, we ask commenters to update the record. For example, has recent case law[303] or Commission precedent[304] altered or clarified the First Amendment analysis that would be applicable to multiple ISP access? Have marketplace conditions in the residential high-speed Internet access business changed since the close of the pleading cycle in ways that alter the First Amendment

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[303] *See, e.g., Satellite Broadcasting & Commun. Ass'n v. FCC*, 2001 WL 1557809 (4th Cir., Dec. 7, 2001), *aff'g* 146 F. Supp. 2d 803 (E.D. Va. 2001); *Time Warner Ent. Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001).

[304] *See Carriage of Digital Television Broadcast Signals, CS Docket No. 98-120, Local Broadcast Signal Carriage Issues, CS Docket No. 00-96, Application of Network Non-Duplication, Syndicated Exclusivity and Sports Blackout Rules to Satellite Transmission of Broadcast Signals, CS Docket No. 00-2*, First Report and Order and Further Notice of Proposed Rule Rulemaking, FCC 01-22 ¶¶ 112-15 (rel. Jan. 23, 2001), available at 2001 WL 69391 (tentatively concluding that the mandatory simultaneous carriage of both a television station's digital and analog signals may burden cable operators' First Amendment interests substantially more than is necessary to further the legitimate interests).

analysis? Have trials and limited commercial offerings of different kinds of multiple ISP access shown that certain types of access place a minimal burden on the cable operators while achieving the maximum choice for subscribers?

81. *The Fifth Amendment*. Several commenters argue that multiple ISP access would constitute a "per se" or "regulatory" taking of the cable operator's property without just compensation under the Takings Clause of the Fifth Amendment to the U.S. Constitution.[305] We seek comment on this issue. If a form of multiple ISP access did entail a taking, what would be "just compensation" for it? Would ensuring just compensation necessarily involve regulators in setting the price that a cable operator charges unaffiliated ISPs (or vice versa)? Or could just compensation be ensured by some market-based process of negotiations? Do recent technological developments, technical trials, and limited commercial offerings of multiple ISP access indicate that some forms of multiple ISP access minimize occupation of the cable operator's property and economic harm to it? We request comment on these issues.

82. *Other Constitutional Issues*. We seek comment on whether there are additional constitutional concerns related to multiple ISP access requirements.

C. Marketplace Developments

83. Since we issued the Notice, the cable modem service marketplace has changed significantly. As discussed above, the cable modem service business is still nascent,

[305] *See, e.g.*, Charter Reply Comments at 34; Cox Comments at 50-51. The relevant portion of the Fifth Amendment provides: " . . . nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. V.

and the shape of broadband deployment is not yet clear. Business relationships among cable operators and their service offerings are evolving.[306] Until recently, some cable operators had exclusive contracts with one affiliated ISP. Now, AOL Time Warner, Comcast and AT&T have each reached agreements that allow certain ISPs access to the cable operator's system. As described in detail above,[307] in accordance with conditions imposed on the AOL Time Warner merger by the FTC, AOL Time Warner already is offering ISP choice to its subscribers.[308] Comcast recently announced that an unaffiliated company, United Online, and its NetZero and Juno Internet services would be available as part of Comcast's cable modem service.[309] Comcast also appears to have reached a conditional agreement with Microsoft to provide MSN ISP service on non-discriminatory terms.[310] AT&T has announced that it plans to deploy multiple-ISP service commercially in several major markets by mid-2002 and that EarthLink will be included in its cable modem service in certain cities.[311] Finally, Cox is conducting technical trials of multiple ISP access.[312]

[306] *See supra* paras. 20-29.

[307] *See supra* para. 26.

[308] *See supra* note 8.

[309] Comcast, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Service* (press release), Feb. 26, 2002.

[310] AT&T Comcast Corp., SEC Filing S-4, Feb. 11, 2002 (containing Exchange Agreement dated as of Dec. 7, 2001, between Microsoft Corp. and Comcast Corp).

[311] *See supra* note 120.

[312] *See supra* note 124.

84. We ask that commenters refresh the record on these points, and we intend to monitor the industry closely. We seek comment in particular on whether the commercial relationships and trials discussed above demonstrate that the market will provide consumers a choice of ISPs without government intervention, or whether the absence of widespread business arrangements raises a level of concern sufficient to warrant Commission action. If parties believe that Commission intervention is necessary, we ask that they describe in detail what sort of regulations we should impose. We also request comment regarding whether any decision we make about multiple access requirements for cable systems in this proceeding should apply to Open Video Systems.[313]

85. In considering multiple ISP access requirements, we will seek to promote the goals set forth in paragraphs 4-6 above. We seek comment regarding whether, in current and likely future market conditions, any form of multiple ISP access is needed to promote those goals. For example, would a multiple ISP access mandate promote deployment of advanced telecommunications capability; spur investment in facilities to provide high-speed Internet access service and innovation among service providers, ISPs, and creators of content; and/or facilitate intramodal or intermodal competition?[314] Or would it have the opposite effects? Moreover, we seek comment on whether the Commission's decisionmaking should be guided by princi-

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[313] Communications Act §§ 651, 653, 47 U.S.C. §§ 571, 573.

[314] In this context, we refer to "intramodal" competition as competition among providers using the same type of facilities (*e.g.*, incumbent and competitive Local Exchange Carriers ("LECs"), cable operators and overbuilders). "Intermodal" competition is competition among providers using different types of facilities (*e.g.*, LECs and cable operators).

ples which embrace intramodal competition. If so, we seek comment on whether the market can or will satisfy these principles or whether some form of multiple ISP access regime for cable systems is needed to do so. To what extent should our decision regarding multiple ISP access requirements be influenced by the desirability of 'regulatory parity,' namely the presence or absence of multiple ISP access regimes for other technologies (such as wireline, terrestrial wireless, and satellite) that offer residential high-speed Internet access service?[315] To what extent should that decision be impacted by cable operators' current status as the leading providers of residential broadband services?

86. *Consumer Demand.* If there is a demand for access to several ISPs, is that demand being met today? Specifically, does "click through" access to any ISP and content on the World Wide Web produce the same, or almost the same, value that a regulatory system of multiple ISP access would produce? Is any cable operator or ISP denying, or likely to deny, click through access?

87. We note that we are unaware of any allegation that a cable operator has denied "click through" access to other ISPs. Moreover, although it is technically feasible for a cable operator to deny access to unaffiliated content, or to relegate unaffiliated content to the "slow lane" of its residential high-speed Internet access service, we are unaware of a single allegation that a cable operator has done so.[316] Is the threat that subscriber access to Internet con-

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[315] *See Wireline Broadband NPRM, supra* note 12, at ¶ 6 ("the Commission will strive to develop an analytical framework that is consistent, to the extent possible, across multiple platforms").

[316] *See* Adelphia Reply Comments at 7 n.23 (stating that "Adelphia is not aware of a single allegation in the comments that Adelphia, or any other operator, has actually engaged in any activity de-

tent or services could be blocked or impaired, as compared to content or services provided by the cable operator or its affiliate, sufficient to justify regulatory intervention at this time?

88. *Cost/Benefit Analysis.* We request comment on the costs that a multiple ISP access mandate would impose on cable operators and on the benefits that a mandate would bring to consumers. Would some forms of multiple ISP access be less costly to cable operators[317] and more beneficial to consumers than others? Is the cost/benefit calculation for multiple ISP access different for small cable operators than it is for others? Would the requirements imposed on telecommunications carriers by our Second or Third Computer Inquiries[318] provide a useful model for a multiple ISP access regime? Would the new forms of multiple ISP access that are being deployed

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signed to 'relegate' certain sites to the 'slow' lane. Indeed, . . . the capability to engage in the posited behavior exists in any ISP."); Comcast Comments at 31 (opining that the "openness that really matters to customers — and what makes the Internet so special and remarkable — is the ability to go anywhere, to access any information with a single click of a mouse. That openness exists with cable Internet today."); Cox Comments at 19 (stating that "once connected [to the Internet], moreover, [consumers] are able to visit any website and access any information (or ISP) they desire"). The Center for Democracy and Technology, a proponent of multiple ISP access that conducted a large study of the broadband business, concluded only that there was "a *theoretical* but cognizable risk of content censorship in the absence of mandated open access." Center for Democracy and Technology Comments at 5 (italics added).

[317] We are struck by the complexity of the proposals for multiple ISP access advocated by some commenters. *See supra* notes 283-287. *See also* AT&T Reply Comments at 17-26; Big Planet Comments at 14; Center for Democracy & Technology Comments at 16-18; Charter Reply Comments at 33-36.

[318] *See supra* note 29.

or are under consideration by cable operators, such as the model being implemented by AOL Time Warner pursuant to the FTC AOL Time Warner Merger Order,[319] provide useful models? Other possible means of effecting a multiple ISP access regime include adopting a general rule of reasonableness for cable operators in their dealings with ISPs seeking access to their cable systems and/or requiring cable operators to make high-speed transmission available to other ISPs at "market-based prices."[320] We could then rely on our complaint processes to resolve individual disputes about these standards. Would such a system of general principles and case-by-case adjudication achieve our goals in a timely and cost-effective manner?

89. What lessons, if any, do trials and current commercial offerings of multiple ISP access[321] reveal about the costs and benefits of multiple ISP access and how such costs and benefits can be balanced? Has recent experience with the addition of source-based routers, described in paragraph 15 above, showed that technology to be an efficient form of multiple ISP access?

90. What would be the costs of regulatory enforcement of a multiple ISP access mandate? Would a multiple ISP access mandate lead to significant opportunities for regulatory arbitrage — businesses making decisions based on regulatory classifications rather than on customers' preferences and innovative and sustainable business plans? Would a multiple ISP access mandate impose long term costs on the market? In light of the new and fast-changing nature of the residential high-speed Internet access business, would a multiple ISP access requirement,

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[319] *See supra* note 8.

[320] *See Wireline Broadband NPRM*, *supra* note 12, at ¶ 50.

[321] *See supra* paras. 26-29.

imposed at this time, hinder the development of a market that is still evolving?[322] In particular, might a requirement preclude the discovery of network design, content, applications, and business models that would otherwise enjoy widespread adoption and enhance long-term consumer welfare?[323] Is there a way to implement multiple ISP access now that would avoid any such harmful interference in the future and that would achieve the goals we set forth in paragraphs 4-6 above? If we adopt a multiple ISP access mandate for cable systems generally, should we exempt small cable systems from such a mandate because of the particular conditions that they face?

91. We recognize that much comment has already been provided regarding these issues, in this proceeding and others. Accordingly, we are particularly interested in comments that provide updated information and discuss relevant regulatory and judicial decisions issued since the comment period closed in this proceeding. We are likely to find particularly relevant and persuasive empirically supported studies that use well-established methods for quantifying benefits and harms, as well as comments based on well-established economic theory.

92. *Changing Market Conditions*. If we ultimately conclude not to impose multiple ISP access at this time,

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[322] Adelphia Reply Comments at 10-11 (listing unresolved technical issues in multiple ISP access).

[323] *See also* AeA Comments at 11 (stating that "agreements, which reflect commercial reality, are preferable to the imposition of a one-size fits all common carrier approach"); Comcast Comments at 38 (noting the uncertainty about how many subscribers will place the greatest value on ease of searching, instant messaging capabilities, vast amounts of proprietary content, backbone capacity, or filtering out offensive content); NCTA Comments at 63-64 (same). *See also Universal Service Report*, 13 FCC Rcd at 11524 ¶ 46, 11540 ¶ 82.

what, if any, future events should lead us to do so? Are there market conditions that are not currently pervasive but, should they become pervasive, would suggest the need for a multiple ISP access mandate in the future?[324] Would these conditions include the acquisition of market power by cable operators in providing residential high-speed Internet access, cable operators' refusals to satisfy subscriber demand for multiple ISP access, or the evolution of a mature market for residential high-speed Internet access? Would a finding that subscriber access to Internet content or services may be blocked or impaired, as compared to other content or services, particularly that provided by the cable operator or its affiliate, support regulatory intervention? We seek comment on other conditions that would suggest regulation is needed and on objective, readily measurable criteria by which we could detect the occurrence of such conditions. Is ongoing monitoring appropriate to ensure that any relevant conditions are detected accurately and in a timely manner and, if so, what type of monitoring?

93. We also seek comment on indicia that a cable operator is offering a "telecommunications service"[325] or private carrier service, on a stand-alone basis, to ISPs or subscribers. Such an offering might provide the Commission with grounds, respectively, for common carriage regulation or exercise of its ancillary authority. How might we detect that a cable operator is, in fact, making such an offering? If and when a cable operator makes such an offering, what, if any, access requirements should

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[324] As previously noted, the FTC and this Commission have separately analyzed the question of whether the AOL Time Warner merger created market conditions warranting intervention applicable to the merged firm. *See supra* note 8.

[325] Communications Act § 3(46), 47 U.S.C. § 3(46).

the Commission impose on it? For example, if we found that a cable operator were making such an offering, would that trigger the requirements of *Computer II and III* with respect to the retail offering of cable modem service to subscribers or make their application in the public interest?[326] To what extent should these decisions impact, or be impacted by, the conclusions we make in our *Wireline Broadband NPRM* proceeding? We note that providers of individually negotiated private carriage may begin to make standard offerings of transmission service to the general public, so that the service becomes a telecommunications service within the meaning of the Act. We seek comment on the appropriate scope of regulation of any such offerings. We also seek comment on whether it would be appropriate to forbear from particular Title II obligations in these circumstances.[327]

94. *Forbearance from Telecommunications Service Obligations*. As noted above, the U.S. District Court for the Southern District of California has expressed its view that it is bound by the Ninth Circuit's *Portland* decision with regard to the classification of cable modem service.[328] The court noted, however, that the Ninth Circuit left open the question whether the Commission would exercise its forbearance authority to remove any telecommunications service regulations from the provision of cable modem service. Further, the district court stayed its proceedings "pending the resolution of the FCC's NOI proceeding" to determine whether the Commission will for-

[326] *See supra* paras. 42-43.

[327] Communications Act § 10, 47 U.S.C. § 160.

[328] *See supra* note 219.

bear in this circumstance.[329] We note that the NOI remains open, and we address the issue of forbearance here.

95. To the extent that cable modem service may be subject to telecommunications service classification, we seek comment on whether we should forbear from applying each provision of Title II or common carrier regulation.[330] We invite comment on whether enforcement of such provisions is not necessary to ensure that the charges, practices, classification or regulations in connection with cable modem service are just and reasonable and not unjustly or unreasonably discriminatory. Is enforcement not necessary for the protection of consumers? Would forbearance be consistent with the public interest? We tentatively conclude that such forbearance would be justified. As an initial matter, we note our determination that cable modem service, as described in the record, is appropriately classified as an information service and does not contain a distinct telecommunications service.[331] The Commission has a long history of classifying information services as Title I services and thus not subject to the obligations and requirements imposed on services subject to Title II.[332] Given that cable modem service will be treated as an information service in most of the country, we tentatively conclude that the public interest would be served by the uniform national policy that would result from the exercise of forbearance to the extent cable modem service is classified as a telecommunications service. We also

[329] *GTE.Net LLC v. Cox Commun., Inc.*, Case No. 00-CV-2289-J (BEN), Order Granting Motion to Stay and Denying Motion to Dismiss, slip. op. at 10 (Jan. 29, 2002).

[330] Communications Act § 10, 47 U.S.C. § 160.

[331] *See supra* paras. 38-39.

[332] *See* authorities cited *supra* note 139.

believe that forbearance would be in the public interest because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing. For these same reasons we tentatively conclude that enforcement of Title II provisions and common carrier regulation is not necessary for the protection of consumers or to ensure that rates are just and reasonable and not unjustly or unreasonably discriminatory. As such, we believe that forbearance from the requirements of Title II and common carrier regulation is appropriate in this circumstance. We request comment on this analysis. Again, we request that commenters focus on how such forbearance and/or regulation would further the Commission's goals, stated in paragraphs 4-6 above.

D. Consequences Of Legal Classification As Information Service

1. State and Local Regulation of Cable Modem Service and Rights-Of-Way.

96. As discussed above, cable modem service is an interstate information service within the scope of our jurisdiction over interstate and foreign communications.[333] We recognize, however, that it is provided over the facilities of cable systems that occupy public rights-of-way in local communities. In order to facilitate our national policy goals, we seek to clarify the authority of State and local governments with respect to cable modem service.

97. By addressing the classification issues in the accompanying Declaratory Ruling, we seek to remove regulatory uncertainty that may discourage investment and innovation in broadband services and facilities. In this part

[333] *See* Communications Act § 2(a), 47 U.S.C. § 152(a).

of the Notice of Proposed Rulemaking, we address potential areas of regulatory uncertainty at the State and local levels that could also discourage such investment and innovation. We would be concerned if a patchwork of State and local regulations beyond matters of purely local concern resulted in inconsistent requirements affecting cable modem service, the technical design of the cable modem service facilities, or business arrangements that discouraged cable modem service deployment across political boundaries. We also would be concerned if State and local regulations limited the Commission's ability to achieve its national broadband policy goals to "promote the deployment of advanced telecommunications capability to all Americans in a reasonable and timely manner," "to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[334]

98. Accordingly, we seek comment regarding whether we should interpret the Commission's assertion of jurisdiction under the Communications Act to preclude State and local authorities from regulating cable modem service and facilities in particular ways.[335] We note that the courts have recognized the Commission's authority

[334] *See* 47 U.S.C. § 157 note, § 230(b)(1), (2).

[335] *See supra* Section IV. B. *See generally* LSGAC Advisory Recommendation No. 26, at 2-3 (Title VI provides local governments with sufficient authority to address competition between affiliated and unaffiliated content providers, play a meaningful role in overseeing the deployment of advanced cable services, and ensure that providers of advanced services address local and specific community needs and interests).

under Title I to preempt non-Federal regulations that negate the Commission's goals, including regulations affecting enhanced services.[336] We seek comment as to any additional basis for preempting such regulations. For example, does section 624(b) provide preemptive authority? Section 624(b) states that a franchising authority "may not . . . establish requirements for . . . other information services."[337]

99. Below we address three specific types of local requirements that may be affected by our determination that cable modem service is an interstate information service: access requirements, franchise requirements, and franchise fees. However, we also request comment on any other forms of State and local regulation that would limit the Commission's ability to achieve its national broadband policy, discourage investment in advanced communications facilities, or create an unpredictable regulatory environment. Specifically, we seek comment as to whether we should use our preemption authority to preempt specific state laws or local regulations. We ask commenters to specify what preemption authority we would rely on in each case.

100. *Access Requirements*. For the most part, States and localities that have considered imposing access requirements have done so in the context of their Title VI authority to review cable franchise transfers.[338] In light of

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[336] *See California v. FCC*, 39 F.3d 919, 931-33 (9th Cir. 1994); *Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198, 214-218 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

[337] 47 U.S.C. § 544(b)(1).

[338] *See* Communications Act §§ 613(d), 617, 47 U.S.C. §§ 533(d), 537. Access conditions imposed by Portland and Multnomah County, Oregon and Henrico County, Virginia were overturned pursuant to section 621(b), 47 U.S.C. § 541(b) as beyond the

our conclusion that cable modem service is an interstate information service, we seek comment on any regulatory authority that State and local governments may have with respect to cable modem service as an information service, including any authority to impose multiple ISP access requirements or to prohibit, limit, restrict, or condition the provision of cable modem service. Is such regulation consistent with any exercise of our jurisdiction over cable modem service under Title I, including any affirmative decision we might make to refrain from imposing specific regulatory requirements?

101. *Rights-of-Way and Franchising Issues*. The Commission has long recognized the important responsibility of local and State governments to manage rights-of-

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franchisors' Title VI authority. *See MediaOne Group, Inc. v. County of Henrico* ("*Henrico County*"), 257 F.3d 356, 363-64 (4th Cir. 2001) (access requirement compelling the cable operator to offer the platform separately for the use of unaffiliated ISPs impermissibly required the cable operator to provide telecommunications facilities); *Portland*, 216 F.3d at 877-880 (the transport function of cable modem service was a separate telecommunications service, which could not be addressed pursuant to cable franchising authority conferred by Title VI). A Broward County, Florida ordinance requiring all cable operators offering cable modem service to provide open access was overturned based on First Amendment considerations and was withdrawn in a subsequent settlement agreement. *See Comcast Cablevision of Broward County, Inc. v. Broward County*, 124 F. Supp. 2d 685 (S.D. Fla. 2000); *Broward County Settles Open Access Lawsuit with AT&T, Comcast*, COMMUNICATIONS DAILY, April 17, 2001. In other cases, franchising authorities considering multiple ISP access requirements determined that present and future competition for broadband Internet services obviated the need for a mandatory access requirement. *See supra* note 9. As discussed *supra* para. 26, several cable operators have announced their intentions to accommodate multiple ISPs.

way.[339] Indeed, Congress in 1984 sought to "establish franchise procedures and standards which encourage growth and development of cable systems and which assure that cable systems are responsive to the needs and interests of the local community," and to "establish guidelines for the exercise of Federal, State, and local authority with respect to the regulation of cable systems."[340]

102. We request comment on how our classification of cable modem service as an interstate information service impacts rights-of-way and franchising issues. We note that section 621 authorizes local franchising authorities to require cable operators to obtain a franchise to construct a cable system over public rights-of-way.[341] Once a cable operator has obtained a franchise for such a system, our information service classification should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service. We seek comment on this tentative conclusion. We also seek comment on whether providing additional services over upgraded cable facilities imposes additional burdens

[339] *See* Communications Act § 253(c), 47 U.S.C. § 253(c) (preserving for State and local governments authority over rights-of-way); Communications Act § 602(7)(B), 47 U.S.C. § 522(7)(B) (excluding from definition of cable system subject to franchising authority a facility that serves subscribers without using any public right-of-way); *TCI Cablevision of Oakland County, Inc.*, Petition for Declaratory Ruling, Preemption and Other Relief Pursuant to 47 U.S.C. §§ 541, 544(e), and 253, CSR-4790, Memorandum Opinion and Order ("*Troy Decision*"), 12 FCC Rcd 21396, 21441-42 (1997), *reconsideration denied*, ("*Troy Reconsideration Order*") 13 FCC Rcd 16400, 16414 ¶ 43 (1998); *Definition of a Cable Television System*, MM Docket No. 89-35, Report and Order, 5 FCC Rcd 7638, 7639 ¶ 10 (1990).

[340] Communications Act § 601(2)-(3), 47 U.S.C. § 521(2)-(3).

[341] 47 U.S.C. § 541(a)(2).

on the public rights-of-way such that the existing franchise process is inadequate. If so, does Title VI nevertheless preclude local franchising authorities from imposing additional requirements on cable modem service? We note that section 624(b) provides that, in a request for proposals for a franchise or franchise renewal, a franchising authority "may not . . . establish requirements for video programming or other information services."[342] Furthermore, section 624(a) provides that "[a]ny franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title."[343] Based on the foregoing, we tentatively conclude that Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service.

103. We also seek comment generally on the scope of local franchising authority over facilities-based providers of information services. Do State statutes and constitutional provisions authorizing local franchising in terms of utility services generally, or cable and telecommunications networks and services specifically, authorize localities to franchise providers of information service under existing law? If so, is there any basis for treating facilities-based providers of information services differently based on the facilities used?

104. As the Commission has previously stated, we believe that "administration of the public rights-of-way should not be used to undermine efforts of either cable or telecommunications providers to upgrade or build new

[342] 47 U.S.C. § 544(b)(1). *See* 1984 House Report at 68, 1984 U.S.C.C.A.N. at 4705.

[343] 47 U.S.C. § 544(a).

facilities to provide a broad array of new communications services."[344] We expect that State and local governments share this view and will work to facilitate the deployment of broadband services in their communities. The Commission has previously expressed concern about unnecessary regulation at the local level that extends far beyond local government interests in managing the public rights-of-way,[345] and about the discriminatory application of regulation at the State and local levels.[346] We are concerned that State or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs on the development of new broadband services. Some commenters have raised questions about potential State and local actions that could restrict entry, impose access or other requirements on cable modem service, or assess fees or taxes on cable Internet service.[347] We seek comment on these issues.

105. Franchising authorities have expressed concern that their rights to collect franchise fees on cable modem

[344] *Troy Decision*, 12 FCC Rcd at 21429 ¶ 78 (conditions imposed on grant of construction permits for cable system upgrades limiting use of the system for telecommunications services were found to violate § 621(b)(3)(B)).

[345] *See generally Troy Decision*, 12 FCC Rcd at 21440-41 ¶ 102; *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, 12714-15 (1999).

[346] *See Troy Decision*, 12 FCC Rcd at 21442 ¶ 107.

[347] Comcast Comments at 41; CCTA Reply Comments at 4-11 (citing to local franchising authority and State government attempts to impose access and other requirements on cable modem service, and expressing concern that some cities will seek to expand their jurisdiction over cable modem service generally and that competitors will leverage the local regulatory process to seek access requirements, or customer service or technical standards underwritten by competitors).

service for the use of public rights-of-way would be affected if we were to find that cable modem service is not a cable service.[348] We note that section 622(b) provides that "the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's gross revenues derived . . . from the operation of the cable system to provide cable services."[349] Given that we have found cable modem service to be an information service, revenue from cable modem service would not be included in the calculation of gross revenues from which the franchise fee ceiling is determined. Furthermore, we tentatively conclude that Title VI does not provide an independent basis of authority for assessing franchise fees on cable modem service. We seek comment on this issue. We also note Congress' concern regarding new taxes on Internet access imposed for the purpose of generating revenues when no specific privilege, service, or benefit is conferred and its concern re-

[348] *See* National League of Cities, et al. Comments at 13 ("the cost . . . in lost franchise fees would be staggering"); Marin Comments at 7 ("[t]he failure to classify cable modem service as a cable service will have very adverse financial and regulatory consequences for public agencies"); New Orleans Comments at 4, 10 (cable modem service is a cable service and cable operators must pay franchise fees on revenues from this service); NATOA Comments at 22 (local authority to manage and receive compensation for access to public rights-of-way is recognized in the Communications Act); NATOA Reply Comments at 33-34 (anticipating consumer complaints regarding cable modem service and noting that the Commission previously expanded the franchise fee revenue base to include pay-per-view programming, leased access, and advertising revenues largely because of franchise authority responsibilities to investigate and resolve complaints about these services).

[349] 47 U.S.C. § 542(b).

garding multiple or discriminatory taxes on electronic commerce.[350]

106. *Franchise Fees Previously Paid Pursuant to Section 622.* Cable operators have expressed concern that any determination by the Commission, other than a finding that cable modem service falls within the classification of "cable service," will potentially expose cable operators to refund liability for franchise fees previously paid to localities and collected from subscribers based on cable modem service revenues.[351] We understand that some cable operators, believing they were legitimately carrying out their obligations and rights under Title VI of the Act and

[350] *See* Internet Tax Freedom Act §§ 1101(a), 1104, 112 Stat. 2681-719, 2681-724-726, 47 U.S.C.A. § 151 note. The Internet Tax Freedom Act imposed a moratorium on the ability of State or local governments to impose new taxes on Internet access. This moratorium has been extended through November 1, 2003. Internet Tax Nondiscrimination Act, Pub. L. No. 107-75, 115 Stat. 703 (2001). Franchise fees imposed pursuant to sections 622 and 653 of the Communications Act, 47 U.S.C. §§ 542, 573, for cable services and open video systems, respectively, and any other fee related to obligations of telecommunications carriers under the Communications Act were not considered to be taxes subject to the moratorium. Internet Tax Freedom Act § 1104(8)(B).

[351] *See* CCTA Reply Comments at 12-13 ("both operators and franchise authorities find themselves caught in the middle"); Cox Reply Comments at 2 n.4; National League of Cities Reply Comments, Attachment (Letter from Kathi Noe, Director, Government Affairs, AT&T Broadband, to Janet Freeland, Senior Financial Analyst, Real Property Division, City of Palo Alto, Cal. (Dec. 15, 2000)) at 2 ("Suspension of franchise fees on @Home is particularly important in states within the Ninth Circuit, because of the existence of State consumer protection laws which often give rise to class action or other litigation. Such lawsuits might seek a refund of any fees not lawfully collected . . . ."); *id.* (Letter from Stanford T. Inouye, Area Franchise Manager, AT&T Broadband, to Pam Berrian, Franchise Manager, City of Eugene, Or. (Dec. 13, 2000)) (same).

local franchise agreements, collected franchise fees based on cable modem service revenues, identified these fees on subscriber bills, and remitted these franchise fees to local franchising authorities pursuant to the terms of their franchising agreements. In light of the Ninth Circuit's decision that cable modem service is not a "cable service," some cable operators have suspended collecting and remitting franchise fees for revenues from cable modem service in Ninth Circuit States out of concern about their exposure to significant litigation risk if they were to continue collecting a franchise fee on cable modem service.[352] We understand that subscribers in other jurisdictions have raised the issue of whether franchise fees were lawfully collected from them and whether the fees collected should be refunded.[353]

107. While the Commission generally will not assert jurisdiction over franchise fee disputes that concern matters of local taxation, the Commission's policy has been to resolve franchise fee questions that bear directly on a national policy concerning communications and that call upon our expertise.[354] We seek comment on whether dis-

[352] *See, e.g.* Cox Reply Comments at 2 & n.4.

[353] *See* Letter from David E. Mills, Dow, Lohnes & Albertson, Counsel to Cox, to W. Kenneth Ferree, Chief, Cable Services Bureau, FCC (Oct. 16, 2001), referring to pending litigation captioned *Bova v. Cox Communications, Inc.*, Civil Action No. 7:01 CV 00090 (W.D. VA.) (class action seeking recovery of franchise fees collected on cable modem service).

[354] *Amendment of Parts 1, 63 and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, MM Docket No. 84-1296, Memorandum Opinion and Order, 104 FCC 2d 386, 393 ¶¶ 18-19 (1986), *aff'd on this point sub nom. ACLU v. FCC*, 823 F.2d 1554, 1573-75 (D.C. Cir. 1987); *see also Time Warner Entertainment/Advance-Newhouse Partnership and the City of Orlando, Florida*, Petitions for Declaratory Ruling on

putes regarding franchise fees based on cable modem service implicate such a national policy, given that the fees in question were collected pursuant to section 622 and that our classification decision will alter, on a national scale, the regulatory treatment of cable modem service. We seek comment on whether it is appropriate to exercise our jurisdiction under section 622 to resolve the issue of previously collected franchise fees based on cable modem service revenues or whether these issues are more appropriately resolved by the courts. We note that until the release of the Commission's declaratory ruling to the contrary, cable operators and local franchising authorities believed in good faith that cable modem service was a "cable service" for which franchise fees could be collected pursuant to section 622. As illustrated by the Fourth Circuit's statement in *Henrico County*, that "the issue of the proper regulatory classification of cable modem service . . . is complex and subject to considerable debate,"[355] cable operators and franchising authorities could not have been expected to predict that the Commission would classify cable modem service as other than a cable service.

108. *Consumer Protection and Customer Service.* We also seek comment on how our information service classification may affect other aspects of State or local regulation, such as consumer protection and customer service standards regarding cable modem service. Franchising authorities have expressed concern that their authority to impose consumer protection requirements pursuant to section 632 of the Communications Act would be affected if cable modem service is not classified as "cable ser-

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Franchise Fee Issues, Memorandum Opinion and Order, 14 FCC Rcd 7678 (1999).

[355] *Henrico County*, 257 F.3d at 365.

vice."[356] Does the authority conferred on franchising authorities by section 632(a) of the Communications Act to establish and enforce customer service requirements apply to cable modem service provided by a cable operator?[357] Do the provisions in section 632(d), stating that nothing in Title VI "shall be construed to prohibit any State or any franchising authority from enacting or enforcing any consumer protection law, to the extent not specifically preempted by [Title VI]," or "to prevent the establishment or enforcement" of customer service laws or regulations that exceed Commission standards or address matters not addressed by Commission standards under section 632, apply to cable modem service?[358]

2. Pole Attachments

109. The Pole Attachment Act gives cable television systems and providers of telecommunications service the right to attach to poles of power and telephone companies at regulated rates.[359] In *Gulf Power*, the United States Supreme Court held that the Pole Attachment Act applies to attachments by cable television systems that provide Internet service in addition to traditional cable service, without regard to the classification of the commingled cable modem service.[360] An attachment not falling within the statutory rate formulas provided in sections 224(d) for attachments by cable service providers or 224(e) for attachments

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[356] *See* NATOA Comments at 20-21; National League of Cities, et al. Comments at 13-14.

[357] *See* Communications Act § 632(a), 47 U.S.C. § 552(a).

[358] *See* 47 U.S.C. § 552(d)(1), (2); *see also* 47 C.F.R. §§ 76.309 76.1602, 76.1603.

[359] Communications Act § 224, 47 U.S.C. § 224.

[360] *Gulf Power*, 112 S.Ct. at 786, 787-88, 789.

by telecommunications service providers would be subject to just and reasonable rates prescribed by the Commission.[361] In the *Pole Attachment Order*, the Commission had determined that the pole attachment rate applicable to attachments by cable television systems using pole attachments to provide both traditional cable services and Internet services should be determined by applying the formula specified in the statute for cable services.[362] That decision is not affected by our categorization of cable modem service.

3. Universal Service

110. Several commenters have questioned whether cable operators should be required to contribute to the universal service fund, pursuant to section 254(d) of the Communications Act,[363] based on the revenues from cable operators' cable modem service offerings.[364] In particular, commenters have focused on whether universal service contribution obligations should attach to what they characterize as the underlying telecommunications compo-

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[361] *Id.* at 787-88. *See* 47 U.S.C. § 224(d), (e).

[362] *See Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, CS Docket No. 97-151, Report and Order ("*Pole Attachment Order*"), 13 FCC Rcd 6777, 6794-96 ¶¶ 32, 34 (1998).

[363] 47 U.S.C. § 254(d).

[364] *See, e.g.*, Comcast Comments at 42-43; SBC/BellSouth Comments at 37, Reply Comments at 22-23; OPATSCO Comments at 2-4; Texas Office of Public Utility Counsel Comments at 21; USTA Comments at 23-24; VoiceStream Reply at 1, 14-17; *see also* USTA Petition for Declaratory Ruling on Universal Service Contribution Obligations of Cable Operators that Provide Telecommunications Service (GN Docket No. 00-185, filed Sept. 26, 2000).

nent of cable modem service.[365] The Commission is considering whether providers of cable modem service should contribute to the universal service fund in a separate proceeding.[366]

4. Protection of Subscriber Privacy

111. Section 631 of the Communications Act addresses privacy for subscribers to "any cable service or other service" provided by a cable operator.[367] "Other service" is defined as "any wire or radio communications service provided using any of the facilities of a cable operator that are used in the provision of cable service"[368] and has been interpreted by a court to encompass Internet service pro-

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[365] If a cable operator were to be also classified as a telecommunications carrier because it provides a separate telecommunications service, universal service contribution obligations would be mandatory under section 254(d) of the Communications Act. 47 U.S.C. § 254(d). Section 254(d) also provides the Commission with the discretion, if the public interest so requires, to impose universal service contribution obligations on "any provider of interstate telecommunications" (as distinguished from telecommunications *service*). 47 U.S.C. § 254(d).

[366] *See Wireline Broadband NPRM*, FCC 02-42, ¶¶ 79-80.

[367] A "cable operator" is defined for purposes of section 631 to include "any person who (i) is owned or controlled by, or under common ownership or control with, a cable operator, and (ii) provides any wire or radio communications service" as well as persons within the definition in section 602. 47 U.S.C. § 551(a)(2)(C) (citing 47 U.S.C. § 522(5)). The Commission has interpreted this section to encompass cable operators and their affiliates that provide any wire or radio communications service. *See FCC AOL Time Warner Merger Order*, 16 FCC Rcd at 6665 ¶ 279.

[368] 47 U.S.C. § 551. Subsection (a)(2)(B) defines "other service."

vided via a cable system.[369] Section 631 requires cable operators to provide periodic written notice informing each subscriber about the nature and use of personally identifiable information to be collected by the cable operator. With certain exc ptions, section 631 prohibits a cable operator from collecting or disclosing such information without the prior consent of the subscriber.[370] The cable operator can collect information needed to provide a cable service or other service and can disclose information for a business activity related to such services. Section 631 further provides that "[n]othing within this title shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy."[371]

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[369] *See Application of the United States of America for an Order Pursuant to 18 U.S.C. § 2703(D)* ("*Application of the United States*"), 157 F. Supp. 2d 286, 291 (S.D.N.Y. 2001).

[370] 47 U.S.C. § 551(a), (b), (c). The provisions in subsection (h), regarding the standard of proof for a court order and giving the subject an opportunity to appear and contest the claims made to support a court order, have been found to be inapplicable to "other service." *See Application of the United States*, 157 F. Supp. 2d at 291 (citing 47 U.S.C. § 551(a)(2) (defining "other service" for purposes other than section (h)). An exception to the restriction on disclosure added by the USA Patriot Act permits an operator to disclose personally identifiable information to a government entity as authorized under certain provisions of title 18 of the United States Code, other than records regarding the subscriber's selection of video programming. *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001 ("USA Patriot Act"), Pub. L. No. 107-56, Title II, § 211, 115 Stat. 283 (2001), 47 U.S.C. § 551(c)(2)(D).

[371] 47 U.S.C. § 551(g). *See* National League of Cities, et al. Comments at 15 (arguing that the privacy provisions of § 631 can and should apply to cable modem service).

112. In light of our determination in the Declaratory Ruling that cable modem service is an information service, we believe that cable modem service would be included in the category of "other service" for purposes of section 631. We seek comment on this interpretation. Although section 631's terms are enforced by the courts, and not by the Commission,[372] we seek comment as to how the privacy requirements of section 631 affect providers of cable modem service.[373]

V. ADMINISTRATIVE MATTERS

A. Initial Regulatory Flexibility Analysis

113. As required by the Regulatory Flexibility Act of 1980, as amended ("RFA"),[374] the Commission has prepared this Initial Regulatory Flexibility Analysis ("IRFA") of the possible significant economic impact on a substantial number of small entities by the policies and rules considered in the notice of proposed rulemaking initiated herein. Written public comments are requested on this IRFA. Comments must be identified as responses to this IRFA and must be filed by the deadlines for comments on the notice of proposed rulemaking provided in paragraph

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[372] *See* 47 U.S.C. § 551(f) (providing that any person aggrieved by the section may bring a civil action in a United States district court).

[373] As a condition for its approval of the AOL Time Warner merger, the Commission required AOL Time Warner to certify periodically that AOL Time Warner is and will remain in compliance with section 631. *FCC AOL Time Warner Merger Order*, 16 FCC Rcd at 6665 ¶ 279.

[374] *See* 5 U.S.C. § 603. The RFA, 5 U.S.C. § 601 *et. seq.*, has been amended by the *Small Business Regulatory Enforcement Fairness Act of 1996* ("SBREFA"), Pub. L. No. 104-121, Title II, 110 Stat. 847 (1996).

142 of this item. The Commission will send a copy of the notice of proposed rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration ("SBA").[375] In addition, the notice of proposed rulemaking and the IRFA (or summaries thereof) will be published in the Federal Register.[376]

1. Need for, and Objectives of, the Proposed Rules

114. With our declaratory ruling herein, we have sought to provide regulatory certainty for the emerging cable modem service industry by resolving a nationwide controversy concerning the proper regulatory classification of cable modem service under federal law.[377] In doing so, we recognize that there are a number of related issues that may need resolution in the form of federal rules. By this notice of proposed rulemaking, we seek comment on certain issues related to the practical implementation of our classification of cable modem service as an information service.

2. Legal Basis

115. The authority for the action proposed in this rulemaking is contained in Sections 1, 2(a), 3, 4(i), 4(j), 303, and 601 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152(a), 153, 154(i), 154(j), 303, and 521, and Section 706 of the Telecommunications Act of 1996, 47 U.S.C. § 157 nt.

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[375] *See* 5 U.S.C. § 603(a).

[376] *Id.*

[377] Cable modem service refers to the provision of high-speed Internet access service over cable system facilities. *See supra* para. 1.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

116. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[378] The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction."[379] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act.[380] A "small business concern" is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.[381]

117. The SBA has developed a small business size standard for cable and other program distribution," which includes all such companies generating $11 million or less in revenue annually.[382] This category includes, among

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[378] 5 U.S.C. § 603(b)(3).

[379] *Id.* § 601(6).

[380] *Id.* § 601(3) (incorporating by reference the definition of "small business concern" in the Small Business Act, 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency, after consultation with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the Federal Register."

[381] 15 U.S.C. § 632.

[382] 13 C.F.R. § 121.201, North American Industry Classification System ("NAICS") code 513220.

others, cable operators, closed circuit television services, direct broadcast satellite services, multipoint distribution services, open video systems ("OVS"), satellite master antenna television ("SMATV") systems, and subscription television services. According to the Census Bureau data from 1992, there were 1,788 total cable and other pay television services and 1,423 had less than $11 million in revenue.[383] We address cable operators and OVS operators below to provide a more precise estimate of the affected small entities. We do not believe that the other pay television services would be affected by the proposals in this notice of proposed rulemaking.

118. *Cable Systems*. The Commission has developed its own small business size standard for a small cable operator for the purposes of rate regulation. Under the Commission's rules, a "small cable company" is one serving fewer than 400,000 subscribers nationwide.[384] Based on our most recent information, we estimate that there were 1,439 cable operators that qualified as small cable

[383] *See U.S. Department of Commerce, Bureau of the Census, 1992 Economic Census Industry and Enterprise Receipts Size Report*, Table 2D (U.S. Bureau of the Census data under contract to the Office of Advocacy of the U.S. Small Business Administration). These data have been updated for 1997, but without the small business breakout. *See* Summary, 1997 Economic Census, Subject Series: Information, at 24 (issued April 2001). By 1997, the census total for firms in this category had increased to 4,185. *Id.*

[384] 47 C.F.R. § 76.901(e). The Commission developed this definition based on its determinations that a small cable company is one with annual revenues of $100 million or less. *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, MM Doc. Nos. 92-266 and 93-215, Sixth Report and Order and Eleventh Order on Reconsideration, 10 FCC Rcd 7393, 7408-7409 ¶¶ 28-30 (1995).

companies at the end of 1995.[385] Since then, some of those companies may have grown to serve over 400,000 subscribers, and others may have been involved in transactions that caused them to be combined with other cable operators. Consequently, we estimate that there are fewer than 1,439 small cable companies that may be affected by the proposed rules.

119. The Communications Act of 1934, as amended, also contains a size standard for a "small cable operator," which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than one percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000."[386] The Commission has determined that there are 67,700,000 subscribers in the United States.[387] Therefore, an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all of its affiliates, do not exceed $250 million in the aggregate.[388] Based on available data, we estimate that the number of cable operators serving 677,000 subscribers or less totals approximately 1,450.[389] We do not request or collect information on whether cable operators are affiliated with entities whose gross annual

[385] Paul Kagan Assocs., Inc., Cable TV Investor, Feb. 29, 1996 (based on figures for Dec. 30, 1995).

[386] 47 U.S.C. § 543(m)(2).

[387] *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (2001).

[388] 47 C.F.R. § 76.1403(b).

[389] *See FCC Announces New Subscriber Count for the Definition of Small Cable Operator*, Public Notice, 16 FCC Rcd 2225 (2001).

revenues exceed $250,000,000,[390] and therefore are unable to estimate accurately the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

120. *Open Video Systems*. Because OVS operators provide subscription services,[391] OVS falls within the SBA-recognized definition of "Cable and Other Program Distribution."[392] This standard provides that a small entity is one with $11 million or less in annual receipts.[393] The Commission has certified approximately 25 OVS operators to serve 75 areas, and some of those are currently providing service.[394] Affiliates of Residential Communications Network, Inc. ("RCN") received approval to operate OVS systems in New York City, Boston, Washington, D.C. and other areas. RCN has sufficient revenues to assure us that they do not qualify as small business entities. Little financial information is available for the other entities authorized to provide OVS that are not yet operational. Given that other entities have been authorized to provide OVS service but have not yet begun to generate revenues, we conclude that at least some of the OVS operators qualify as small entities.

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[390] We do receive such information on a case-by-case basis only if a cable operator appeals a local franchise authority's finding that the operator does not qualify as a small cable operator pursuant to section 76.901(f) of the Commission's rules. *See* 47 C.F.R. § 76.990(b).

[391] *See* 47 U.S.C. § 573.

[392] 13 C.F.R. § 121.201, NAICS Codes 51321 and 51322.

[393] *Id.*

[394] *See* Federal Communications Commission, *Filings for Certification of Open Video Systems*, at http://www.fcc.gov/csb/ovs/csovscer.html (visited Jan. 8, 2002).

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

121. The notice of proposed rulemaking seeks comment on the regulatory implications of the Commission's finding that cable modem service is an information service under the Communications Act.[395] Specifically, the notice of proposed rulemaking seeks comment on whether the Commission should require cable operators that provide cable modem service to allow unaffiliated ISPs to have direct access to the cable operator's subscribers via the cable system facilities.

122. The notice of proposed rulemaking also seeks comment on the scope of state and local government authority over cable modem service in light of the Commission's finding that it is an information service. This determination may not have a direct effect on small entities, but indirectly it may impact small entities, such as small cable operators, if local governments are permitted to require cable operators to grant unaffiliated ISPs access to the cable system or if local governments are permitted to enforce other regulations that affect a cable operator's provision of cable modem service.

5. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

123. The IRFA requires an agency to describe any significant alternatives that it has considered in proposing regulatory approaches, which may include, among others, the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timeta-

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[395] 47 U.S.C. § 153(20).

bles that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

124. The notice of proposed rulemaking seeks comment on several regulatory alternatives to implement the Commission's classification of cable modem service as an information service under the Communications Act. For example, alternatives considered in the notice of proposed rulemaking include whether unaffiliated ISPs should be provided with access to cable systems and, if so, which of the various access models should be adopted. In addition, we will also consider whether any access requirements ultimately adopted should be different for large cable operators from those imposed on small cable operators.[396] Finally, the notice of proposed rulemaking considers whether the Commission should refrain entirely from imposing any ISP access requirements on cable operators. We would expect that whichever alternatives are chosen the Commission will seek to minimize any adverse effects on small entities.

6. Federal Rules Which Duplicate, Overlap, or Conflict with the Commission's Proposals

125. None.

B. Procedural Provisions

126. *Comments and Reply Comments.* Pursuant to applicable procedures set forth in sections 1.415 and 1.419

[396] *See* ACA Comments at 15-18.

of the Commission's rules,[397] interested parties may file comments on the notice of proposed rulemaking in CS Docket No. 02-52, *Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities*, on or before 60 days after date of publication in the Federal Register, and reply comments on or before 90 days after date of publication in the Federal Register. Comments may be filed using the Commission's Electronic Comment Filing System ("ECFS") or by filing paper copies.[398] Given recent changes in the Commission's mail delivery system, parties are strongly urged to use the ECFS to file their pleadings. Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Only one copy of an electronic submission must be filed. In completing the transmittal screen, electronic filers should include their full name, Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To receive filing instructions for e-mail comments, commenters should send an e-mail to ecfs@fcc.gov, and should include the following words in the body of the message, "get form <your e-mail address>." A sample form and directions will be sent in reply.

127. Parties who choose to file by paper must file an original and four copies of each filing in CS Docket No. 02-52. If parties want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. All filings must be sent to the Commission's Acting Secretary, William F. Caton, Office of

[397] 47 C.F.R. §§ 1.415 and 1.419.

[398] See Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24121 (1998).

the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20054. All filings sent to the Commission by overnight delivery, *e.g.*, Federal Express, must be sent to the Commission's Acting Secretary, William F. Caton, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington D.C. 20024. All hand-delivered or messenger-delivered filings must be delivered to the Commission's filing location at 236 Massachusetts Avenue, N.E., Suite 110, Washington, D.C. 20002-4913.[399] The filing hours at this facility are 8:00 a.m. to 7:00 p.m. Parties must also serve the following with either one copy of each filing via e-mail or two paper copies: (1) Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com; and (2) Sarah Whitesell, Cable Services Bureau, 445 12th Street, S.W., 3-C488, Washington, D.C., 20554, swhitese@fcc.gov. In addition, five copies of each filing must be filed with Linda Senecal, Cable Services Bureau, 445 12th Street, S.W., 2-C438, Washington, D.C. 20554, lsenecal@fcc.gov.

128. *Ex Parte Rules*. This proceeding will be treated as a "permit-but-disclose" proceeding, subject to the "permit-but-disclose" requirements under section 1.1206(b) of the Commission's rules.[400] Ex parte presentations are permissible if disclosed in accordance with Commission rules, except during the Sunshine Agenda period when presentations, ex parte or otherwise, are generally prohibited. Persons making oral ex parte presenta-

[399] *See FCC Announces a New Filing Location for Paper Documents and a New Fax Number for General Correspondence*, Public Notice, DA 01-2919 (rel. Dec. 14, 2001).

[400] 47 C.F.R. § 1.1206(b).

tions are reminded that a memorandum summarizing a presentation must contain a summary of the substance and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required.[401] Additional rules pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules. Parties submitting written ex parte presentations or summaries of oral ex parte presentations are urged to use the ECFS in accordance with the Commission rules discussed above. Parties filing paper ex parte submissions must file an original and one copy of each submission with the Commission's Acting Secretary, William F. Caton, at the appropriate address as shown above for filings sent by either U.S. mail, overnight delivery, or hand or messenger delivery. Parties must also serve the following with either one copy of each ex parte filing via e-mail or two paper copies: (1) Qualex International, Portals II, 445 12th Street, S.W., Room CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or e-mail at qualexint@aol.com; and (2) Sarah Whitesell, Cable Services Bureau, 445 12th Street, S.W., 3-C488, Washington, D.C., 20554, swhitese@fcc.gov; and (3) Linda Senecal, Cable Services Bureau, 445 12th Street, S.W., 2-C438, Washington, D.C. 20554, lsenecal@fcc.gov.

129. *Availability of Documents*. Comments, reply comments, and ex parte submissions will be available for public inspection during regular business hours in the FCC Reference Center, Federal Communications Commission, 445 12th Street, S.W., CY-A257, Washington, D.C. 20554. Persons with disabilities who need assistance in the FCC Reference Center may contact Bill Cline

[401] *See id.* § 1.1206(b)(2).

at (202) 418-0267, (202) 418-7365 TTY, or bcline@fcc.gov. These documents also will be available electronically at the Commission's Disabilities Issues Task Force web site: www.fcc.gov/dtf, and from the Commission's Electronic Comment Filing System. Documents are available electronically in ASCII text, Word 97, and Adobe Acrobat. Copies of filings in this proceeding may be obtained from Qualex International, Portals II, 445 12th Street, S.W., Room, CY-B402, Washington, D.C., 20554, telephone (202) 863-2893, facsimile (202) 863-2898, or via e-mail at qualexint@aol.com.

130. This document is available in alternative formats (computer diskette, large print, audio cassette, and Braille). Persons who need documents in such formats may contact Brian Millin at (202) 418-7426, TTY (202) 418-7365, or send an e-mail to access@fcc.gov.

131. *Contact Information*. The Cable Services Bureau contact for this proceeding is Sarah Whitesell at (202) 418-7200, swhitese@fcc.gov. Press inquiries should be directed to Michelle Russo at (202) 418-2358, mrusso@fcc.gov. TTY: (202) 418-7365 or (888) 835-5322.

132. *Declaratory Ruling*. Any future pleadings filed in response to the declaratory ruling in this Order should be filed under the caption, "Internet Over Cable Declaratory Ruling," GN Docket No. 00-185, separately from the comments filed in CS Docket No. 02-52.

VI. ORDERING CLAUSES

133. Accordingly, IT IS ORDERED, that pursuant to authority contained in sections 1, 2, 3, 4, 303, 403, and 601 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 153, 154, 303, 403, 521, section 706 of the Telecommunications Act of 1996, and section

1.2 of the Commission's Rules and Regulations, 47 C.F.R. § 1.2, this Declaratory Ruling and Notice of Proposed Rulemaking ARE ADOPTED.

134. IT IS FURTHER ORDERED that, pursuant to the authority contained in sections 1, 2, 3, 4, 303, 403, and 601 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 153, 154, 303, 403, 521, section 706 of the Telecommunications Act of 1996, and section 1.2 of the Commission's Rules and Regulations, 47 C.F.R. § 1.2, NOTICE IS HEREBY GIVEN of the proposals described in this Notice of Proposed Rulemaking.

135. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, shall send a copy of this Notice of Proposed Rulemaking, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

* * *

SEPARATE STATEMENT OF CHAIRMAN MICHAEL K. POWELL

Re: Inquiry Concerning High-Speed Access on the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet over Cable Facilities, GN Docket 00-185.

I. Introduction

One might ask what is in a name? In the law, a great deal. When Congress crafts legislation it defines the rights, responsibilities and obligations by reference to particular definitions or classifications. In the multifaceted world of communications it has defined the rights and obligations differently, depending on the nature of the service offered without regard to the means in which it is offered.

Thus, the Commission has an inescapable duty to determine the will of Congress by faithfully applying these definitions to new services. This is not an easy task, given all communication services have some similar and overlapping features.

II. There Are Three Statutory Classifications

For our purposes, there are three essential regulatory definitions under the statute, each having different regulatory consequences: "Telecommunications service" is defined in 47 U.S.C. § 153(46). "Cable service" is defined in Section 602(6). And "information service" is defined in the United States Code in Section 153(20).

If one looks throughout the statute, one will see clearly that Congress ascribed different regulatory treatment to these classifications — sometimes more regulatory oversight, sometimes less. For example, a cable service pro-

vider cannot be regulated as a common carrier pursuant to the statute.[1] Yet, as a consequence of the statute, a telecommunications service provider is regulated as a common carrier. Most importantly, "information service" is a conscious regulatory classification under the statute. Not only is it defined, there are specific references to it throughout the statute.

For example, the Commission under its discretion can extend universal service obligations to providers that *use* telecommunications who are *not* telecommunications carriers (who must contribute to universal service). This indicates Congress recognized classes of services, other than telecommunications service that may have to be reached by Commission discretion, rather than mandatory application under the statute. Similarly, the schools and libraries provisions make specific reference to information services as being covered by the provision, entitling schools and libraries to discounted service. Or, one can look at the network sharing provision of Section 259 and see specific reference to information service as well as telecommunication services.

III. The Classification Is Not An Exercise In Regulatory Free Will

The Commission does not have unconstrained discretion to pick its preferred definition or classification, as some imply. The Commission must attempt to faithfully apply the statutory definition to a service, based on the nature of the service, including the technology used and its capabilities, and the nature of the interactive experience for the consumer. This "is complex and subject to

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[1] *See* Communications Act § 621 (c), 47 U.S.C. § 541 (c).

considerable debate and . . . appropriately left to the expertise of the FCC." [2]

The Commission is not permitted to look at the consequences of different definitions and then choose the label that comports with its preferred regulatory treatment. That would be contrary to law. The Commission must apply the definition and then accept the regulatory regime that adheres to that classification and that which Congress chose when it adopted the statute.

IV. Commission Is Not Neutered By This Classification

The Commission is not left powerless to protect the public interest by classifying cable modem service as an information service. Congress invested the Commission with ample authority under Title I. That provision has been invoked consistently by the Commission to guard against public interest harms and anti-competitive results.

It was this Commission that promulgated *Computer I, Computer II and, Computer III,* (all under Title I) in an effort to protect against public interest harms, all with the blessing of judicial review and court sanction of its ancillary authority. Additionally, Title VI is a direct progeny of the Commission's assertion of jurisdiction over cable services under its Title I authority and has regulated cable extensively for a number of years under that authority. This exercise, too, was approved by the Supreme Court as within the congressional scheme.[3]

There is no basis to conclude that Title I is inadequate to strike the right regulatory balance. The Commission's willingness to ask searching questions about competitive

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[2] *MediaOne Group, Inc. v. County of Henrico,* 257 F. 3d 356 (4th Cir. 2001).

[3] *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968).

access, universal service and other important policy issues demonstrates its commitment to explore, evaluate and make responsible judgments about the regulatory framework.

SEPARATE STATEMENT OF COMMISSIONER KATHLEEN Q. ABERNATHY

Re: Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling Proceeding; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket 00-185.

The declaratory ruling we adopt today provides the long-awaited answer to a pivotal question: What is the appropriate regulatory classification of cable modem service? I am pleased that this item will end the regulatory uncertainty that has led to divergent interpretations of the Act by the courts of appeals and that may well have hampered the deployment of cable modem facilities and the introduction of these services to consumers. I commend the Cable Services Bureau and my fellow commissioners for developing an analytical framework that not only represents the best reading of the Act but also serves important public policy objectives. Classifying cable modem service as an information service will promote our goal of fostering a "minimal regulatory environment that promotes investment and innovation in a competitive market."[1] It also provides the opportunity to create a more consistent regulatory framework across technological platforms.

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[1] *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers*, CC Docket No. 02-33, Notice of Proposed Rulemaking ¶¶ 5-6 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*").

As we have done in the *Wireline Broadband NPRM*, I believe it is important to seek comment on the appropriateness of wholesale access obligations. It may turn out that marketplace developments concerning multiple ISP access will make regulatory intervention unnecessary. Most of the factors that cable operators had formerly cited as impediments to offering consumers a choice of ISPs — exclusive contracts with affiliated ISPs and technical feasibility concerns, for example — appear to have been resolved. Accordingly, in addition to AOL Time Warner, which offers a choice of ISPs pursuant to merger conditions imposed by the Federal Trade Commission, Comcast and AT&T Broadband have announced agreements under which they will provide consumers with a choice of ISPs, and Cox is conducting technical trials. I also hope that the declaratory ruling we adopt today will provide a blueprint for cable operators that seek to negotiate additional access arrangements with independent ISPs. By establishing that cable operators may enter into access arrangements with independent ISPs on a private carriage basis, our ruling makes clear that cable operators can provide choice without necessarily subjecting themselves to common carrier regulation.

Overall, however, while these marketplace developments and our clarification of the legal regime provide a basis for optimism, I remain concerned that some cable operators may continue to offer consumers only a single brand of ISP service or that cable operators generally may offer only two or three options. As the owners of the nation's most extensive broadband architecture and as the leading providers of broadband service, cable operators have the potential to suppress competition. I believe that the Commission should not yet dismiss proposals to impose some kind of access requirement without better evi-

dence that robust competition among broadband ISPs will develop on its own.

The interrelation of this proceeding and the *Wireline Broadband NPRM* is a critical part of my decision to seek further comment on whether to impose an access obligation on providers of cable modem service. Cable modem and DSL providers appear to be competing in a converged broadband marketplace, yet DSL providers alone are subject to a series of unbundling and nondiscrimination requirements under *Computer II/III*. I therefore believe that it would be inappropriate for the Commission not even to *consider* imposing access obligations on cable operators. I recognize that there are substantial differences in the historical treatment of wireline common carriers and cable operators, and that it may not be appropriate or even within our statutory authority to seek complete parity in our regulatory treatment of broadband services provided over the wireline and cable platforms.[2] Nevertheless, we are faced with a single overarching question with respect to each service: What is the appropriate role for the Commission in ensuring that consumers receive the benefits of competition and choice? If the Commission decides to maintain some form of access obligation at the conclusion of the *Wireline Broadband* proceeding, we would need to develop a compelling rationale if we were to refrain from imposing an analogous requirement on cable operators.

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[2] I encourage commenters to provide detailed arguments on our statutory authority to impose a cable access requirement, including in particular the provisions of the Act that might support our exercise of ancillary authority under section 4(i). I note that, while the Commission relied on that provision in adopting the *Computer Inquiry* requirements, there may be a greater nexus between those requirements and the provisions of Title II than exists between a cable access requirement and other affirmative grants of authority.

Finally, I am pleased that the Commission has decided to tackle the challenging questions relating to state and local jurisdiction over cable modem services. We must balance the legitimate role of local franchising authorities in managing rights-of-way against the risk that excessive regulation will hamper efforts by cable operators to upgrade plant and roll out new broadband services. I believe that our state and local colleagues have no desire to erect regulatory barriers that would thwart our efforts to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[3] I look forward to working closely with local franchising authorities and their representative associations so that we can cooperatively establish appropriate guidelines for right-of-way management.

DISSENTING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Internet Over Cable Declaratory Order Proceeding Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, GN Docket 00-185

Just one month ago, the Commission adopted a Notice of Proposed Rulemaking regarding the classification of broadband services delivered by wireline providers ("*Wireline Broadband NPRM*"). I dissented from that Notice and expressed concern that some might read that *Notice* and conclude that the Commission had a predetermined agenda to deregulate dominant providers in the market. The spate of newspaper stories and magazine articles in the intervening month bears out the concern that I expressed. Many analysts and observers have concluded

[3] Telecommunications Act of 1996, § 706, 47 U.S.C. § 157 note.

exactly that. Today, I am afraid the Commission reinforces these conclusions. After just four weeks, and before comments have even been received in the *Wireline Broadband* proceeding, we embark on a very similar path for cable modem services, only this time we leapfrog from a generalized Notice of Inquiry to an extraordinarily far-reaching Declaratory Ruling.

I cannot support either the timing of the Declaratory Ruling or its conclusions, which create dangerous uncertainty in the growing market for cable broadband services. I sympathize with the concerns of cable system operators, local franchising authorities, and others about the lack of regulatory clarity in this area. But this Declaratory Ruling does not provide the certainty sought by these entities, instead placing cable modem services into the regulatory uncertainty of Title I.

The decision the Commission will make today strays far afield from the regulatory construct established by Congress. Congress provided statutory frameworks for cable and for telecommunications carriers under Title VI and Title II, respectively. The statute makes clear that, to the extent that a cable operator serves as a common carrier subject to the provisions of Title II, the regulations prescribed by Title VI do not apply. Similarly, a telecommunications carrier generally regulated under Title II is subject to the obligations in Title VI to the extent it is providing a cable service. So the statutory provisions accommodate cable system operators' delivery of new or hybrid services, even where those services may not fit neatly into the existing regulatory classifications. For example, there is widespread agreement that telephony provided over the cable plant is subject to Title II regulation. A powerful case has been made that cable modem services should also be subject to Title II.

Video services provided over the telephone system are subject to Title VI. Were cable modem services similarly subject to Title VI, provisions governing general franchising authority, the ability of local authorities to assess franchise fees, and the cap on such fees would continue to apply.

But under the classification scheme adopted today, the categorizations become much more difficult. For example, is IP telephony subject to Title II as is cable telephony, or Title I, as is cable modem service? Is video streaming over cable modem service subject to Title VI as are traditional video services delivered by cable systems, or is that too now subject to the vagaries of Title I?

The Ruling will force cable modem services into the generally deregulated information services category, subject only to the Commission's ancillary jurisdiction of Title I. I cannot conceive that Congress intended to remove from its statutory framework core communications services such as the one at issue in this proceeding. I cannot imagine that it envisioned its statutory handiwork being made obsolete by a new service offering.

But make no mistake — today's decision places these services outside any viable and predictable regulatory framework. First, it concludes that, as a statutory matter, cable modem services are not cable services. Next, it concludes that cable operators providing cable modem services over their own facilities are not offering telecommunications services because subscribers are purchasing only information services. This is the same forced analysis the Commission tentatively reached in the *Wireline Broadband NPRM*. Those who conclude that the Commission has now resolved that particular proceeding after just one month may be pardoned.

Next, the Commission addresses the situation in which a cable operator offers its cable modem service as an input provided to an unaffiliated ISP. Although the decision concludes that the record provides insufficient information to determine whether cable operators are offering pure transmission services to ISPs, the majority determines — with scant analysis — that it expects that any cable operators that offer pure telecommunications in the future would be offering only private carriage. Doesn't insufficient information mean that the Commission should refrain from broad pronouncements until it can acquire the necessary data?

Finally, the Commission dismisses out of hand the argument raised in the record that the Commission's current rules by their terms require cable operators to offer access to unaffiliated Internet providers. These rules require carriers that offer transmission capacity using wire or radio to offer transmission services to competing information service providers.[1] This policy has been key to the development of a competitive information services market. The Ruling, however, concludes with scant analysis that these access requirements only apply to wireline telephone companies.

The Ruling seems uneasy with its own conclusions. Just in case we are wrong, and access requirements *were* to apply, they are waived, on the Commission's own motion, with neither notice nor comment. And if even *that* stretch somehow fails to get the point across, the *NPRM* adopted today also takes steps to ensure that these services remain deregulated in the face of any court opinion to the

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[1] *See* 47 U.S.C. § 153(10). In light of this broad definition of common carrier, Congress expressly exempted cable services regulated under Title VI from regulation as a common carrier. 47 U.S.C. § 541(c).

contrary. Even if cable modem services are found by the courts to be subject to regulation, the Commission would forbear from enforcing those obligations. So, in this analysis the majority makes a determination, but just in case it got the determination wrong, it waives the rule it determined did not apply, and, should the courts disagree, we simply forbear from enforcing the rule. That's a far distance down the road from the simple NOI we are working from, isn't it?

Once the Ruling has reached its desired result to remove these services from regulatory requirements, we are then told not to worry — the Commission can build its own regulatory framework under its ancillary jurisdiction. Years ago, when I worked on Capitol Hill, we used to worry about legislation on an appropriations bill. Down here, I'm learning that I have to look out for legislation on an NPRM.

The NPRM adopted by the Commission today raises the further question — also addressed in a tentative conclusion in the *Wireline Broadband NPRM* — as to whether cable modem services should be subject to an access requirement. The majority notes that certain cable system operators have recently begun to enter into carriage agreements with unaffiliated ISPs. While this progress is worth noting, I would also note that such agreements are quite new, are generally limited to the largest cable systems, and are generally offered to only one or two unaffiliated ISPs. Thus, while there has been some promising movement in the direction of multiple ISP access, the progress has been slow and the course is far from set. The effect of this deliberate pace has been to deny many consumers access to more than one ISP — a circumstance that recently proved a near-disaster when the one ISP carried by some of the nation's largest cable systems abruptly closed its doors.

I am pleased that the majority recognizes in theory the ability of the Commission to impose an access requirement even under its reading of the statute. I am not, however, sanguine that we will ever get there in practice. I do believe that *some* access requirement is necessary in order to ensure that consumers have choices of ISPs. It strikes me as ironic that without such a requirement the Internet — which grew up on openness — may become the province of dominant carriers, able to limit access to their system to all but their own ISPs. I would like to hear from a multiplicity of stakeholders what they believe the nature of a multiple ISP requirement should be, how it could be implemented, and what other regulatory or public interest implications would accompany the imposition of such a requirement.

Today we take a gigantic leap down the road of removing core communications services from the statutory frameworks established by Congress, substituting our own judgment for that of Congress and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another. Last month I remarked that in our *Wireline Broadband* proceeding, we were out-driving the range of our headlights. Today I think we are out-flying the range of our most advanced radar.

Let me repeat my serious misgivings about not just the propriety, but the wisdom of the Commission proceeding directly from a general Notice of Inquiry to the adoption of such far-reaching conclusions in so important an area of national policy. How America deploys broadband is the central infrastructure challenge our country faces. It is a public policy matter of enormous implications. How

we get it done affects not only how many megabytes of information our computers can download, but what kinds of options consumers will be able to choose from, what kinds of protections they will have against misguided or fraudulent business practices, and what kinds of opportunities will be available to those in our society who do not share fully in our general prosperity. With so much at stake, I would have hoped for a little more modesty and measured pace on our part.

APPENDIX C

[Filed Mar. 31, 2004]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRAND X INTERNET SERVICES,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Respondent.

[and consolidated cases]

Nos. 02-70518, 02-70684, 02-70685.

ORDER

Before: CUDAHY, O'SCANNLAIN, and THOMAS, Circuit Judges.

The panel has voted unanimously to deny rehearing with respect to the petitions filed by the Federal Communications Commission and the United States of America; the National League of Cities, National Association of Telecommunications Officers and Advisors, United States Conference of Mayors, National Association of Counties, and Texas Coalition of Cities for Utilities Issues; Time Warner Cable, Charter Communications, Inc. and Cox Communications, Inc.

A majority of the panel has voted to deny the suggestions for rehearing en banc filed by the FCC and the United States, the National League of Cities *et al.*, and the National Cable & Telecommunications Association *et*

al. Judge O'Scannlain voted to grant the suggestions for rehearing en banc. Judge Thomas voted to deny the suggestions for rehearing en banc, and Judge Cudahy so recommended.

The full court has been advised of the petitions for rehearing en banc and no active judge requested a vote on whether to rehear the matters en banc. Fed. R. App. P. 35.

The petitions for rehearing and suggestions for rehearing en banc are therefore DENIED.

APPENDIX E

UNITED STATES CODE

TITLE 47

TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS

CHAPTER 5

WIRE OR RADIO COMMUNICATION

* * *

47 U.S.C. § 153 (2001)

§ 153. Definitions

For the purposes of this Act, unless the context otherwise requires —

(7) Cable service

The term "cable service" has the meaning given such term in section 522 of this title.

(20) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of

information of the user's choosing, without change in the form or content of the information as sent and received.

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

* * *

47 U.S.C. § 522 (2001)

§ 522. Definitions

For purposes of this title —

(6) the term "cable service" means

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection or use of such video, programming or other programming service.

Supreme Court, U.S.
FILED
SEP 30 2004
OFFICE OF THE CLERK

(4) (5)

Nos. 04-277 & 04-281

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
PETITIONERS,
AND
FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
PETITIONERS,
V.
BRAND X INTERNET SERVICES, ET AL.,
RESPONDENTS.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS BRAND X INTERNET SERVICES AND CENTER FOR DIGITAL DEMOCRACY IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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September 30, 2004

QUESTION PRESENTED

Whether the court of appeals correctly held that, under the statutory definitions contained in the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et. seq.*, and contrary to the Declaratory Ruling by the Federal Communications Commission, cable modem service includes both "information service" and "telecommunications service" components.

PARTIES TO THE PROCEEDING

Respondents adopt the list of parties to the proceeding in the court of appeals contained in the Petition for a Wrjt of Certiorari filed by the Federal Communications Commission and the United States.

RULE 29.6 DISCLOSURE

Respondent Brand X Internet Services is a privately held company, incorporated in California. It has no parent or subsidiaries.

Respondent Center for Digital Democracy is a not-for-profit corporation incorporated in the District of Columbia.

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November 25, 2003 Letter from Gregory M. Milonovich, Federal Bureau of Investigation, to Marlene H. Dortch, Secretary, Federal Communications

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STATEMENT

Brand X Internet Services and the Center for Digital Democracy submit that the petitions should be denied.

There are thousands of Internet Service Providers (ISPs), most offering service over traditional telephone dial up connections.[1] With the advent of cable modems (devices to connect users to the Internet over cable lines) in the mid-1990s, consumers also became able to access the Internet over cable lines at speeds many times faster than dial up connections.[2] ISPs, whether they had access to broadband cable facilities or only dial up, competed then (as now) to provide customers content, email, access to newsgroups, the ability to create a personal web page and access to the WorldWide Web.[3] Those with access to the cable system, however, had (and still have) a competitive leg up. As the FCC has noted, broadband allows subscribers the ability to "utilize more sophisticated 'real time' applications," to "view streaming video" and to make better use of private network Intranets.[4] Cable companies, however, have generally been unwilling to offer competing ISPs access to their cable lines,[5] claiming either that full non-discriminatory access would discourage investment in broadband deployment[6] or was beyond the FCC's authority to require.[7] As a result, they became nearly exclusive providers of Internet service at high

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[1] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19287, ¶¶ 6-9 (2000) [hereinafter *NOI*].

[2] *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities Declaratory Ruling*, 17 F.C.C.R 4798, ¶ 99 and n.21 (2002) [hereinafter *Declaratory Ruling*].

[3] *Declaratory Ruling*, *supra* note 2, at ¶ 10.

[4] *Id.* at ¶ 117.

[5] *See, e.g., Declaratory Ruling*, *supra* note 2, at ¶¶ 47.

[6] *Id.* at n.176.

[7] *See* Comments of National Cable & Telecommunications Ass'n (Dec. 1, 2000), [hereinafter NCTA Comments], *passim*, available at http:gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159666 through 512159668 (last visited Sept. 20, 2004).

speeds.[8] While that status has changed somewhat with (1) the deployment by phone companies of another broadband platform -- digital subscriber line ("DSL") technology,[9] (2) the limited availability of other nascent broadband technologies, such as fixed wireless,[10] two-way satellite transmission,[11] and broadband over electric powerlines[12] and (3) limited access arrangements prompted by the threat of government intervention by the Justice Department's Antitrust Division and the Federal Trade Commission,[13] the broadband market remains, by the FCC's account, "very highly concentrated,[14]" a market in which cable holds a 60 percent share[15] and both cable operators and telephone companies offering DSL service "have raised their prices for high-speed Internet access services."[16]

This case concerns the FCC's classification of cable modem service as exclusively an interstate "information

[8] *Declaratory Ruling, supra* note 2, at ¶¶8-10; *NOI, supra* note 1, at ¶ 29.
[9] *Declaratory Ruling, supra* note 2, at ¶ 9.
[10] *Id.*
[11] *Id.*
[12] *See, e.g., In re Carrier Current Systems, including Broadband over Power Line Systems Notice of Inquiry* 19 F.C.C.R. 3335 (2004) (hereinafter *BPL Inquiry*).
[13] *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc., Transferee,* 16 F.C.C.R. 6547 (2001) (*FCC AOL Time Warner Merger Order*); (America Online, Inc. and Time Warner, Inc.,) Federal Trade Commission, No. C-3989, File No. 0010105, Decision and Order (Dec. 14, 2000)(FTC AOL Time Warner Merger *Order*).
[14] *In re Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands, Notice of Proposed Rulemaking and Memorandum Opinion and Order,* 18 F.C.C.R. 6722, ¶ 123 (2003) (the *average* broadband market, it found, had an HHI concentration index of 5400, three times what the Justice Department's Antitrust Division considers competitively troublesome).
[15] *Id.*
[16] *Declaratory Ruling, supra* note 2, at ¶ 9.

service" under the 1996 Telecommunications Act, exempt from the common carrier obligations that would flow if the underlying transmission component of the service were instead found to be a "telecommunications service" under the Act. While the case had its immediate origins in what has been termed the cable "open access" debate, i.e., whether cable companies offering Internet service over their high speed, *i.e.*, "broadband" cable facilities are required under the provisions of the '96 Act to provide competing ISPs with non-discriminatory access to their systems, the statutory provisions in question actually incorporate FCC regulatory concepts that trace back to the early 1970s. It was then that "the FCC began wrestling with fundamental questions concerning the observed growing convergence between the 'modern-day electronic computer' and 'communication common carrier facilities and services.'"[17] That process led the FCC in *Computer I*[18] to develop distinctions between regulated common carrier transmission services and largely unregulated and competitive data processing services[19] delivered *via* telephone transmission networks. To protect competition in data processing services, the telephone companies that wished to offer both services were required to offer them separately.[20]

[17] Richard S. Whitt, *A Horizontal Leap Forward: Formulating a New Communications Public Policy Framework Based on the Network Layers Model*, 56 Fed. Comm. L.J. 587, 597 (2004)[citation omitted].
[18] *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities,* 28 F.C.C. 2d 267 (1971), *aff'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F.2d 724 (2d Cir. 1975) (hereinafter *Computer I*).
[19] *Computer I, supra* note 18, defined data processing as the "use of a computer for the processing of information as distinguished from circuit or message-switching." *Computer and Communications Industry Association v. FCC*, 693 F.2d 198, 203 n.6 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) [hereinafter *CCIA*].
[20] *CCIA, supra*, 693 F.2d at 203.

By 1980, the FCC had refined these distinctions, adopting in *Computer II* [21] "bright line" [22] definitions of regulated "basic" services[23] and largely unregulated "enhanced" services. [24] As it had in *Computer I*, the FCC sought to address the concern that "carriers would gain an unfair competitive edge by discriminating in favor of their own enhanced service offerings in providing access."[25] Companies owning transmission networks could not avoid regulation of basic services, the FCC made clear, by simply combining those services with an offer of enhanced services:

> Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. Enhanced services by definition are services "offered over common carrier transmission facilities." Since the *Computer II* regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.

In Re Filing and Review of Open Network Architecture Plans, Memorandum and Order, 4 F.C.C.R. 1, 141 (1988) [hereinafter Open Network Architecture Plans].[26]

In the mid-1990s Congress debated the need to overhaul the 1934 Federal Communications Act in light of technological changes and its desire to promote competition between the established national telephone companies and new carriers, ultimately adopting the Telecommunications Act of 1996. Congress codified the FCC's *Computer II* framework in the '96 Act, and specifically the concepts of "basic" and "enhanced" services that, as the FCC has noted, were directly incorporated into the '96 Act as "telecommunications services" and "information services," [27] respectively. [28] Recognizing the likely increasing importance

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[21] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision*, 77 F.C.C.2d 384 (1980), *Industry Association v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983) [hereinafter *Computer II*].

[22] *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990).

[23] "The FCC defined basic service as the offering of a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *CCIA, supra* note 19, at 205 n.18.

[24] Enhanced services were defined as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information. Enhanced services are not regulated under Title II of the Act." 47 C.F.R. § 64.702(a) (2004).

[25] *California v. FCC*, *supra*, 905 F.2d at 1224.

[26] *Open Network Architecture Plans* was an order issued under the FCC's *Computer III* regime. *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry Phase I Order)*, 104 F.C.C.2d 958 (1986), *rev'd, California v. FCC*, 905 F.2d 1217 (9th Cir. 1990), *cert. denied* 115 S.Ct. 1427 (1995) [hereinafter *Computer III*). *Computer III* had modified certain of the strict structural separation requirements established in *Computer II*, but *Computer III* retained the *Computer II* regulatory framework. What was common to its decisions in *Computer II* and *III* was that under both rules all carriers that own transmission facilities and provide enhanced services (irrespective of whether they had market power) unbundle the transmission path and provide it to other enhanced service providers "under the same tariffed terms and conditions under which they provide such services to their own enhanced service operations." *Petition for Declaratory Ruling that AT&T's Interpass Frame Relay Service is a Basic Service*, 10 F.C.C.R. 13717, 13719 ¶¶ 13-14 (1995), [hereinafter Frame Relay Order].

[27] *See* 47 U.S.C. § 153(43)(2004) ("telecommunications"); 47 U.S.C. § 153(46)(2004) ("telecommunications service")and 47 U.S.C. § 153(20) (2004) ("information services")

[28] As the FCC explained:

> In section 623(b)(1) of the Appropriations Act, Congress directed us to review the Commission's interpretation of these definitions, and to explain how those interpretations are consistent with the plain language of the 1996 Act. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these

of broadband technologies to the delivery of information services, it also added provisions to the Act encouraging the FCC to eliminate unnecessary barriers to the deployment of broadband,[29] requiring it to report periodically on the status of broadband deployment[30] and clarifying that "telecommunications services" used to deliver information services would not be limited to telephone wires. On the latter point, Congress expanded on the *Computer II* framework by expressly providing that telecommunications services would be defined by their function, not the medium used to provide them: "A provider of telecommunication services is a 'telecommunications carrier,' which the Act treats as a common carrier to the extent that it provides telecommunications for the public, *'regardless of the facilities used.'* 47 U.S.C. §153 (44) & (46) (2004)." *AT&T Corp. v. City of Portland,* 216 F.3d 871, 877 (9th Cir. 2000) (emphasis added).

The first application of the new Act to "integrated broadband services" came in 1998 when the FCC ruled that Internet access via DSL included both information service and telecommunications service components:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Brand X Internet Services v. FCC, 345 F.3d 1120, 1137 (9th Cir. 2003) (quoting *Deployment of Wireline Servs. Offering Advanced Telecommunications Capability*, 13 F.C.C.R. 24,012, 24,030 (1998)) [hereinafter *Deployment of Wireline*] (Thomas, concurring). As under *Computer II*, the FCC held that while telephone companies could offer an integrated communications and information service to the public, they were also under "a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services" used to deliver their own information services to end users. *Deployment of Wireline* at 24,030.

One of the other broadband technologies to develop in the mid-1990s, as noted earlier, was the use of coaxial cables and cable modems to provide a high speed connection to the Internet. It was not until 1998, however, that the FCC first considered the issue of "what, if any, regulatory treatment should be applied to cable modem service." *Declaratory Ruling* at ¶ 2. Although it "considered" the issue, unlike the case with classification of DSL broadband, the FCC did not decide anything. By the agency's own description it had ducked making a decision on the classification of cable modem service the numerous times it had come up, "including a complaint case, license transfer reviews in connection with mergers involving cable operators, and a special report by the Commission's Cable Services Bureau." *Id.* By 2003, it had avoided the issue "no less than six times." *NCTA v. Gulf Power Co.*, 534 U.S. 327, 357 (2003) (Thomas, J. and Souter, J., concurring and dissenting).

The FCC's self-described "hands off" policy[31] was on full display when, in 1999, after having elected to participate as *amicus*, it declined to voice its views to the

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new terms to build upon frameworks established prior to the passage of the 1996 Act. *Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "telecommunications service" developed in the Modification of Final Judgment breaking up the Bell system.*

In re Federal-State Joint Board on Universal Service, Report To Congress, 13 F.C.C.R. 11501, 11511 (1998) (emphasis added); *see also Declaratory Ruling, supra* note 2, at ¶ 34 n.139 (basic/enhanced distinction incorporated into 1996 Act).

[29] Pub. L. No. 104-104, Title VII, § 706(a).

[30] Pub. L. No. 104-104, Title VII, § 706(b).

[31] *NOI*, *supra* note 1, at ¶ 4.

Ninth Circuit in a case where the cable modem classification issue was squarely presented. *NOI*, ¶ 12. At the time, the development of cable modem technology and the cable industry's position on access became causes for alarm for both independent ISPs, several consumer groups and a number of communities, who viewed cable company dominance of Internet service at high speeds as likely to limit consumer choice and to raise the price of Internet service. *Id.* A number of these parties, led by AOL,[32] formed the Open Net Coalition to advance the cause of cable open access. *NOI*, ¶ 28. At about the same time, several communities, voicing similar concerns, sought to attach "open access" conditions to the transfer or merger of cable franchises in a number of cities. *NOI*, ¶ 13. One of these cities was the City of Portland, Oregon, which required AT&T to offer cable modem service on a non-discriminatory basis as a condition of its acquisition of the Portland cable system. *Id.*

AT&T challenged Portland's actions in federal district court, arguing that cable modem service was a cable service under the '96 Act, but that the condition exceeded the City's limited authority to regulate cable service under the Act. When the district court upheld the City's position, AT&T appealed the decision to the Ninth Circuit. The Ninth Circuit agreed with AT&T that the City had exceeded its limited authority to regulate cable franchises, but not for the reason AT&T had advocated.

Cable modem service, it held, was not "one-way transmission" and hence not a "cable service" under 47 U.S.C. § 522, so no approval was needed from the City for AT&T to "provide cable broadband Internet access without a cable service franchise." 216 F.3d at 876-77. To ascertain

[32] Following its merger in 2000 with the Time Warner cable system, AOL dropped its support for open access requirements. Reza Dibadj, *Toward Meaningful Cable Competition: Getting Beyond the Monopoly Morass*, 6 N.Y.U. J. Legis. & Pub. Policy 245, 258 (2003) ("AOL switched sides and suddenly became opposed to open access once it was acquired by Time Warner.")

"whether Portland may condition AT&T's provision of standard cable service," the court concluded that it also had to determine how the Communications Act defines cable modem service. *Id.* at 877. On this point, it held that the City did not have the authority to require open access to cable modem service as a condition of AT&T's offering of "standard cable service" because it found that cable modem service includes a telecommunications service and because the statute expressly forbids local cable authorities from requiring cable companies to offer telecommunications services. *Id.* at 878-79. In conducting its statutory analysis the court looked "first to the plain language of the statute," *Id.* at 876, and, noting that the FCC had "declined, both in its regulatory capacity and as *amicus curiae*, to address the issue," concluded that it was "not presented with a case involving "potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Id.* Further observing that its interpretation was consistent with the agency's own interpretation of the '96 Act as applied to "DSL service, a high speed competitive cable broadband," *Id.* at 879, the court concluded that cable modem service consisted of both an information service and a telecommunications service subject to the common carriage requirements of Sections 201 and 202 of the Communications Act:

> Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a 'point of presence' assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic 'telecommunications,' which the Communications Act defines as 'the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.' 47 U.S.C. §153 (43). A provider of

telecommunication services is a 'telecommunications carrier,' which the Act treats as a common carrier to the extent that it provides telecommunications for the public, 'regardless of the facilities used.' 47 U.S.C. §153 (44) & (46).

* * *

Like other ISPs, @Home consists of two elements: a 'pipeline' (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.[33]

Finally, the court observed that the undecided policy question of whether to regulate – the FCC's stated reason for declining to offer its view on the statute – was still in the FCC's hands. Section 10 of the Communications Act permitted the FCC to forebear from regulating telecommunications service on a showing "that such action is unnecessary to prevent discrimination and protect consumers, and is in the public interest." 216 F.3d at 879. It would be up to the FCC, the court held, to determine whether to forebear from regulating cable modem service under these provisions. *Id.*

The court's decision prompted the Commission finally to question whether it could continue to stay on the sidelines – what the respondents had criticized as a policy of de facto forbearance. Citing the Portland decision, and two other decisions it declared to be in conflict with the court's

[33] *City of Portland, supra*, 216 F.3d at 877-78.

ruling,[34] the FCC launched a Notice of Inquiry for the stated purpose of reexamining its so-called "hands off" policy regarding regulation of the Internet. *NOI*, ¶ 4. That policy, it explained, was based "on the belief that 'multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers." *Id.* The *NOI* asked for comments on a number of questions, including whether cable modem service included a telecommunications service as the Ninth Circuit had held in City of Portland, or was some other service, such as cable service, information service or private carriage. *Id.* at ¶¶ 16, 17, 18, 21, 22. It then asked whether, as a matter of public policy, a cable modem access requirement would retard deployment of broadband service, whether an open access requirement was technically feasible and whether, assuming cable modem service was a telecommunications service, it could nonetheless "forebear" from regulating the service under Section 10 of the Communications Act. *Id.* at. ¶¶ 44, 47, 48, 53-56.

The *NOI* elicited comments from hundreds of parties. ISPs as well as various public agencies invoked the Portland decision that the transmission component of cable modem service was a telecommunications service subject to the common carrier provisions of the Communications Act and urged the FCC to decide the question on the basis of the court's ruling.[35] Even if cable operators did not offer the transmission component of cable modem service on a stand alone basis, noted several parties, the FCC's decision in *Computer II* meant that they were required to do so since cable operators were offering it on an indiscriminate basis to the public using their own facilities. *See Declaratory Ruling*,

[34] *NOI*, *supra* note 1, at ¶ 4 (citing *MediaOne Group, Inc. v County of Henrico*, 97 F. Supp. 2d 712 (E.D. Va. 2000) and *Gulf Power Co. v. FCC*, 208 F.3d 1263 (11th Cir. 2000)).

[35] *See, e.g.*, Comments of the Competitive Access Coalition, FCC GN Docket No. 00-185 (December 1, 2000) *available at* <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159329 (last visited Sept. 24, 2004) [hereinafter *CAC Comments*]

¶ 42 n.167. *Computer II*, they argued, required any facilities-based carrier (in simple terms, carriers owning their own wires) including cable operators, to unbundle the underlying transmission capacity of their cable modem services and make it available to other information service providers. *Id.* In addition, several commented that forbearance could not be justified; cable companies dominated broadband deployment and their dominance required continued regulation to protect consumers and competition.[36] The limited competition available from telephone companies providing DSL access could not justify forbearance either, the commenters argued, since the provision of DSL service was itself subject to non-discriminatory access requirements that the FCC had only months earlier found it necessary to strengthen.[37] As to concerns about feasibility, these commenters submitted comments and affidavits detailing their position that non-discriminatory access was indeed feasible and would not retard deployment or depress investment in broadband upgrades to cable systems.[38]

For their part, the cable companies dismissed the Portland decision as "dicta"[39] and maintained that (1) cable modem service was either a cable service exempt from common carriage requirements, private carriage (also exempt), infeasible to provide on a common carrier basis, unnecessary to provide to independent ISPs or (2) that the FCC should forebear from regulating cable modem service under Section 10 of the Communications Act.[40]

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[36] *CAC Comments, supra* note 35, at 45-69.
[37] *Id.* at 51.
[38] *See, e.g.*, Attachment 15 to *CAC Comments*, Jeffrey K. Mackie-Mason, *Investment in Cable Broadband Infrastructure: Open Access is Not an Obstacle* (Nov. 5, 1999) (unpublished report, University of Michigan), *available at* <http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6512159615> through 6512159617. (last visited Sept. 20, 2004).
[39] NCTA Comments at 10.
[40] *Id.* at 2, 14-17, 69-81, 39-67.

The Commission took no action on the comments for a considerable period. In the meantime, AOL completed its merger with Time Warner and, dispelling the technical feasibility argument, accepted a merger condition insisted upon by the Federal Trade Commission and the FCC to address market power concerns: the merged company would offer ISPs access to cable modem service on a non-discriminatory basis and would reach agreement to provide such service to at least three independent ISPs before it could offer AOL service, with compliance to be overseen by a special master.[41]

On February 15, 2002, and presaging the action it would take the following month, the FCC issued its *Wireline Broadband NPRM*, a notice of proposed rulemaking that it termed the "functional equivalent" of the Cable Modem *NOI* it had issued in 2000.[42] Its focus in that case was the appropriate regulatory classification of DSL service, a broadband service offered over telephone wires. The FCC's stated objective was to adopt a "functional approach" to classification of broadband platforms, "focusing on the nature of the service provided to consumers rather than one that focuses on the technical attributes of the underlying architecture." [43] At the time it issued the *Wireline Broadband NPRM* the FCC already had a policy governing broadband over wireline facilities. Based on its own "description of the *Computer II* and *Computer III* regulatory framework," the FCC stated, "the obligations deriving from those proceedings currently apply to the provision of wireline broadband Internet access services by facilities-based telephone companies."[44] In other words, telephone companies were (and still are) required to offer DSL transmission on a stand-alone

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[41] *See FCC AOL Time Warner Merger Order, supra* and *FTC AOL Time Warner Merger Order, supra.*
[42] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019, ¶ 9 (2002) [hereinafter *Wireline Broadband NPRM*].
[43] *Wireline Broadband NPRM, supra* note 46, at ¶ 7.
[44] *Id.* at ¶ 22.

basis to competing ISPs. Although the "*Computer II* and *Computer III* framework" had been developed prior to passage of the '96 Telecommunications Act, the FCC had found, as noted earlier, that the framework had been incorporated into the new Act. Thus, by the time of the 2002 *Wireline Broadband NPRM* the FCC had been applying the "*Computer II* and *Computer III* regulatory framework" to wireline broadband for nearly six years. Nonetheless, the NPRM proclaimed that there were now "very different legal, technological and market circumstances" than when it "initiated the Computer Inquiry line of cases."[45] *Computer II* and *Computer III*, it stated, dealt with "*traditional* information services provided by facilities-based common carriers." [46] In other words, it explained, the "core assumption underlying the *Computer Inquiries* was that" information providers would be providing "narrowband applications."[47] By contrast, it explained, new broadband technology "allows users to interact with media, with information and with each other in way and at speeds that were scarcely considered when the Computer Inquiry began." [48] Its proposed solution was to declare that, if the wireline carrier bundles Internet access with broadband transmission, the whole offering becomes an unregulated information service.[49]

A month later, the FCC issued its *Declaratory Ruling* in the Cable Modem proceeding. Similar to its *Wireline Broadband NPRM*, it reached the conclusion that a bundled offering of broadband transmission over cable and Internet access was a single, unregulated information service. *Declaratory Ruling*, ¶ 39. Its treatment of the *Computer II* and *Computer III* regulatory framework, however, was very different. While the *Wireline Broadband NPRM* proposed a change in the extant requirement that wireline companies offer DSL on a non-discriminatory basis to competing ISPs, the *Declaratory Ruling* announced that the two functions were a single service and that the "telecommunications component" *could not* be separated "from the data processing capabilities of the service." *Declaratory Ruling*, ¶ 39. Further, while the *Wireline Broadband NPRM* declared that *Computer II* and *Computer III* were not fashioned to deal with broadband, the *Declaratory Ruling* concluded that *Computer II* and *Computer III* were inapplicable because they were only intended to deal with telephone wires, not coaxial cable.[50] In both cases, however, the FCC explained that its classifications of DSL and cable modem service were driven by its "primary goal to encourage the ubiquitous availability of broadband"[51] and its belief that, to achieve this end, "broadband services should exist in a minimal regulatory environment."[52]

The March, 2002 FCC order had two parts. The first part consisted of the *Declaratory Ruling* that became the

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[45] *Id.* at ¶ 37. Just what "different legal, technological and market circumstances" the FCC, in fact, had in mind are far from clear. As to changed legal circumstances, it seems implausible that the FCC could have meant the passage of the '96 Act. In the NRPM itself the FCC states that classification of "information services" under the '96 Telecom Act is just an incorporation of the "enhanced services" concept adopted in *Computer II*. *Id.* at ¶ 18 n.38. Nor does the reference to "technological" changes make much sense either. The whole purpose of the *Computer* line of cases was to ensure that technological advances in enhanced services promised by robust competition among enhanced service providers would not be stifled by common carriers seeking to limit that competition. Finally, the market circumstance today, again by the FCC's own account, is that the marketplace for broadband is "very highly concentrated" (*see* n.14, *supra*), the very circumstance that, without unbundling, would impede technological innovation.

[46] *Id.* at ¶ 22 (emphasis added).

[47] *Id.* at ¶ 36.

[48] *Id.*

[49] *Id.* at ¶¶21; 24.

[50] "The Commission," it held, "has never before applied [*Computer II*] to information services provided over cable facilities" and "we decline to extend *Computer II* here." *Id. at* ¶ 43. It offered the explanation that *Computer II* -- which requires unbundling of telecommunications services -- was only meant to apply to facilities-based telephone companies, not cable companies providing telephone services. *Id.* at ¶ 44.

[51] *Wireline Broadband NPRM*, *supra* note 46, at ¶ 3.

[52] *Id.* at ¶ 5. *See also Declaratory Ruling*, *supra* note 2, at ¶ 5.

subject of the case before the Ninth Circuit. In it, the FCC declared, as just noted, that cable modem service is an "information service" exempt from either the common carrier requirements of Title II of the Communications Act governing providers of telecommunications services or Title VI, governing the provision of cable services. It also purported to "clarify" that cable modem service was not only an information service, but an "*interstate* information service." *Declaratory Ruling*, ¶ 59 (emphasis added). While cable modem service employed telecommunications facilities, it held, the service was an integrated "information service" and "there [was] no separate telecommunications service offering to subscribers or ISPs." *Id.* at ¶ 33. The Ninth Circuit's contrary decision in *Portland*, it added, was "based on a record that was less than comprehensive," and was decided without "the benefit of briefing by . . . the Commission" which, although participating as *amicus curiae*, "did not provide its expert opinion on this issue." *Id.* at ¶¶ 57-58.

As previously noted, the FCC also rejected the position that *Computer II* required cable companies to offer the transmission component of its cable modem service to competing ISPs. More specifically, it stated that, with respect to the argument that cable companies were common carriers because they were already using their cable facilities to provide unbundled telephone service, *Computer II* -- which requires unbundling of telecommunications services -- was only meant to apply to facilities-based telephone companies, not cable companies providing telephone services. *Id.* at ¶ 44. In any event, it held, even if it were wrong, it was going to waive *Computer II* requirements on its "own motion" because it did not want to "create an open access regime for cable Internet service only to some operators." *Id.* at ¶ 45.

Finally, acknowledging that some arrangements between cable companies and third party ISPs might involve the provision of an "'input' that is a stand-alone transmission service, making the ISP an end-user of 'telecommunications'

as that term is defined in the Act," it asserted that there was insufficient information in the record to determine the extent of such arrangements. *Id.* at 54. Citing AOL Time Warner's assertion that it was negotiating access "on an individual basis," the FCC concluded that if such arrangements existed, they would not constitute telecommunications services either, but "would be a private carrier service," as would similar stand-alone telecommunications offerings by other cable companies made on "an individualized basis." *Id.* at ¶ 55. The Commission did not explain how AOL Time Warner would be both an exempt private carrier and still subject to an FCC merger requirement "prohibiting specific kinds of discrimination against unaffiliated ISPs, their first screens, their content, and the quality of service afforded them." *Id.* ¶ 2 n.8.

Appended to the *Declaratory Ruling* was a Notice of Proposed Rulemaking in which the FCC tentatively concluded that, if, despite its explanations, cable modem service were held to include a common carrier telecommunications service, it would forbear from regulating the service, thereby achieving essentially the same result. And, to make sure its approach to DSL access was on a par, it concluded that it should forbear from regulating certain broadband services by telephone companies too. *Id.* at ¶¶ 94, 95.

In his dissenting opinion, Commissioner Copps described what he viewed as the result-oriented nature of the Commission's analysis:

> The Ruling seems uneasy with its own conclusions. Just in case we are wrong, and access requirements were to apply, they are waived, on the Commission's own motion, with neither notice nor comment. And if even that stretch somehow fails to get the point across, the NPRM adopted today also takes steps to ensure that these services remain deregulated in the face of any court opinion to the contrary. Even if cable modem services are found by the courts to be subject to

> regulation, the Commission would forbear from enforcing those obligations. So, in this analysis the majority makes a determination, but just in case it got the determination wrong, it waives the rule it determined did not apply, and, should the courts disagree, we simply forbear from enforcing the rule. That's a far distance down the road from the simple *NOI* we are working from, isn't it?[53]

Promptly after the FCC issued its *Declaratory Ruling*, Brand X, a California ISP, brought its petition for review to the Ninth Circuit. Similar petitions were filed by Earthlink, a national ISP, the Consumer Federation of America and the California Public Utilities Commission in the D.C. Circuit but were transferred to the Ninth Circuit by lottery. On October 6, 2003, a three member panel issued its *per curiam* decision in *Brand X Internet Services v. FCC*,[54] reversing the FCC. Addressing the FCC's claim that the statute was ambiguous and that its interpretation was therefore entitled to *Chevron* deference, the court pointed out that, while it had "never explicitly stated in *Portland* that our interpretation was the only one possible, we never said the statute was ambiguous." 345 F.3d at 1131. Expanding on this point in his concurrence, Judge Thomas, who had authored the *Portland* decision, stated that the Court in *Portland* "did not discern any ambiguity in the statutory meaning for the agency to interpret." *Id.* at 1135. In any event, the court concluded, *Chevron* was inapplicable where, as in *City of Portland*, the court had already interpreted the statutory provision in question.[55] It offered two grounds for its ruling.

[53] DOJ app. at 200a.
[54] *Brand X Internet Services v. FCC*, 345 F.3d 1120 (9th Cir. 2003) [hereinafter *Brand X*].
[55] *Id.* at 1132.

The Supreme Court's decision in *Neal v. United States*,[56] the panel explained, holds that the *Chevron* deferential review does not apply where, as in the *Brand X* case, the Supreme Court or a circuit court has previously interpreted the statutory provision in question and that *Neal*, therefore, "required our adherence to the interpretation of the Communications Act we announced in *Portland*." [57] The panel ruled that it was also bound by the circuit's earlier decision in *City of Portland* under the longstanding circuit rule announced by the court *en banc* in *Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988)(*en banc*).[58] Under *Mesa Verde*, the panel noted, circuit "precedent can be disregarded in favor of a subsequent agency interpretation 'only where [unlike the case in Brand X] the precedent constituted deferential review of [agency] decision making.' " [59]

In the months immediately preceding and following the panel decision, the Department of Justice, which had joined in the FCC's merits briefs to the panel, began voicing serious reservations about the FCC's position. CALEA, the Communications Assistance for Law Enforcement Act, 47 U.S.C. § 1001 *et seq.*, grants the federal government certain

[56] 516 U.S. 284, 294-95 (1996). The *Brand X* panel, quoting *Neal*, concluded that it applied, not only to Supreme Court decisions, but to the decisions of lower courts as well:

> Notwithstanding the Supreme Court's use of the term "we," there is nothing to suggest that *Neal*'s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone. *See, e.g., Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) ("*[J]udicial* construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.") (emphasis added); *accord United States v. Mead Corp.*, 533 U.S. 218, 248-49 (Scalia, J., dissenting).

Brand X, supra note 58, at 1132.
[57] *Brand X, supra* note 58, at 1131-32.
[58] *Id.* at 1130-31.
[59] *Id.* at 1130 (quoting *Mesa Verde, supra*).

powers to conduct electronic surveillance, but contains an express exemption for "information services." Because that term is given the same definition under both CALEA and the '96 Telecommunications Act (compare 47 U.S.C. §1001(6) and 47 U.S.C. § 153(20)), the Department of Justice cautioned the FCC, in a letter written only months before the *Brand X* decision was issued, that "[a]ny classification of Internet access as an information service would implicitly classify broadband telephony delivered via Internet access as an 'information service,' thus raising doubts about whether those access providers are 'telecommunications carriers' for purposes of CALEA." DOJ and FBI Ex Parte Presentation In The FCC's Broadband Internet Access Proceedings (July 10, 2003), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6514285462 (visited Sept. 24, 2004). After the *Brand X* decision issued in October, 2003, the FBI reiterated this concern in a November 25, 2003 letter to the FCC, stating that, "no matter what theory the Commission chooses to use" to fulfill its CALEA obligations, one thing it cannot do is "classify internet access service as a pure information service."[60] A month later, the Solicitor General's office joined in a similar letter. The FCC's classification of internet access service in the Cable Modem *Declaratory Ruling* as a pure information service "suffers from statutory interpretation problems and directly threatens CALEA," it stated in a letter signed by, among others, Deputy Solicitor General Hungar.[61] Then, in what the New York Times described as a "highly unusual step,"[62] the Department of Justice "decided to permit the FCC" to petition for rehearing en banc of the *Brand X* panel decision, but refused to join in the petition itself. *Id.*[63]

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[60] App. at 5a.
[61] Earthlink App. at 14a.
[62] Stephen Labaton, *Easing of Internet Regulations Challenges Surveillance Efforts*, N.Y. Times (Jan. 22, 2003) § A , at 1.
[63] *Id.*

Ultimately, "no active judge requested a vote on whether to rehear the matters en banc," National Cable and Telecommunications Association ("NCTA") App. 188a, and the FCC and NCTA rehearing petitions were denied on March 31, 2004. The Solicitor General subsequently requested, and was granted, two extensions of time to decide whether to seek certiorari. Three weeks before the last extension was to expire, the FCC issued a notice of proposed rulemaking announcing a new interpretation of CALEA that, it said, would allow the government to reach cable modem service, notwithstanding its classification as solely an information service under the '96 Telecommunications Act. *See In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services, Notice of Proposed Rulemaking and Declaratory Order,* FCC Nos. ET Docket No. 04-295 and RM-10865 (Aug. 9, 2004). Shortly thereafter the Solicitor General and the FCC jointly filed a petition for certiorari with this Court, as did the cable industry.

REASONS FOR DENYING THE WRITS

The FCC and NCTA advance essentially three arguments in support of their petitions for certiorari. (1) They claim that the Ninth Circuit misapplied the *stare decisis* principles articulated by this Court in *Neal*, *Lechmere* and *Maislin*, (2) they argue that the Ninth Circuit's ruling is at odds with the opinions of several other circuits and (3) they urge the Court to consider the FCC's *Chevron* deference claims directly (*i.e.*, as if *Brand X* had never been issued) because of the national importance of the case. On the last point it bears emphasis that the FCC seeks certiorari, not on the basis that its interpretation would be sustained under *Chevron*, but only that "further review is warranted." FCC Pet. at 15. The protestations of the FCC and NCTA notwithstanding, they have presented no question warranting the attention of this Court.

The Ninth Circuit Correctly Applied *Neal*

Although Petitioners claim error in the lower court's *per curiam* application of this Court's decisions in the *Maislin*, *Lechmere* and *Neal* line of cases, that court applied the settled principles of *stare decisis* established in those cases. In concluding that its earlier decision in *AT&T v. City of Portland* had established the plain meaning of the 1996 Telecommunications Act and that the FCC's subsequent and contrary interpretation of the same Act had to yield, it did no more and no less than *Maislin*, *Lechmere* and *Neal* required.

In disputing the lower court's holding, the FCC makes the strained argument that the *stare decisis* principle in *Neal* applied only to those precedents in which a court had not only interpreted the statute in question, but had expressly found the statute unambiguous, thereby obviating the need for a "step two" *Chevron* analysis. FCC Pet. at 22-23. NCTA makes a similar argument. NCTA Pet. at 24-25.[64] The argument, however, makes no sense. It is "the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). "Once we have determined a statute's meaning," this Court stated in *Neal*, "we adhere to our ruling under the doctrine of *stare decisis*, and we assess the agency's later interpretation of the statute against that settled law." 516 U.S. at 295. In other words, "in

[64] Hedging its bets, NCTA also argues that *Neal* (but not discussing predecessor cases *Maislin Industries U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990) or *Lechmere Inc. v. NLRB*, 502 U.S. 527 (1992)) is "*dictum*" and that, in any event, its application "impedes uniformity among the circuits." NCTA Pet. at 27. By NCTA's own description, *Neal* applies the "***Maislin rule***," (*Id.* at 25, emphasis added) rendering its unexplained and contradictory claim that *Neal* was mere *dictum* wholly meritless. Its "uniformity" concern is also self-contradictory. That argument runs smack into NCTA's acknowledgment, voiced pages earlier, that, "under the Hobbs Act, 28 U.S.C. § 2341 *et seq.*, the classification question cannot be relitigated in other circuits." NCTA Pet. at 21. NCTA's argument thus seems to be an objection to the fact that, under the law's current lottery system, a single circuit's review of agency action can establish binding nationwide precedent. In that case, however, its remedy lies with Congress, not the Supreme Court.

Chevron terms," once the court has interpreted the statute it is no longer ambiguous; its plain meaning has been ascertained by the court. *Lechmere, supra*, 502 U.S. at 537. Indeed, in a case where, as in *Portland*, a court is reviewing a statute directly, there would be no reason to conduct a *Chevron* analysis (*Chevron U.S.A., Inc. v. Natr'l Resources Defense Council, Inc.*, 467 U.S. 837 (1984)) to expressly declare a statute ambiguous or not (although a court might opine on the statute's clarity in explaining its decision). The FCC's interpretation of *Neal* would rob it of any meaning, for if a statute is ambiguous it would render *Neal* inapplicable and if a statute were unambiguous, it would render *Neal* irrelevant.

The argument that the Ninth Circuit's position is at odds with other circuit interpretations of *Neal* is also far wide of the mark. Insofar as respondents can ascertain, the Ninth Circuit and the two other circuits that have applied *Neal*, *Lechmere* or *Maislin* have concluded that an agency's interpretation cannot trump their own prior interpretations of the statute. *See ITT Industries, Inc. v. NLRB*, 251 F.3d 995 (D.C. Cir. 2001);[65] *Bankers Trust New York Corp v. U.S.*, 225 F.3d 1368, 1376 (Fed. Cir. 2000). This is not to say that a court cannot reverse its precedent in the exercise of its own judgment. Several circuits have, as petitioners have noted, *chosen* to revisit their prior statutory interpretations in light of subsequent agency interpretations of the same statutory provisions.[66] In this case, however, since the petitioners never claimed – and still do not claim – that *Portland* was incorrectly decided, the Ninth Circuit was given no reason to revisit its *Portland* decision. But even where an agency urges a court to reverse its precedent, *Chevron* does not dictate that a court *yield* to the agency's interpretation. As Justice Scalia

[65] NCTA erroneously claims that the D.C. Circuit has not applied *Neal*. *See* NCTA Pet. at 22.

[66] These courts, as nn.11 & 12 of the NCTA brief recount, have *elected* to reverse precedent, noting that they are "not precluded from revisiting" earlier rulings, or from looking at a "new source of enlightenment," or reversing course in order to "to promote uniformity" among the circuits. *Id.*

observed in *United States v. Mead Corp.*, 533 U.S. 218, 248-49 (2001) (Scalia, J., dissenting), "I know of no case, in the entire history of the federal courts, in which we have allowed a judicial interpretation of a statute to be set aside by an agency - or have allowed a lower court to render an interpretation of a statute subject to correction by an agency."

The FCC Has Presented No Compelling *Chevron* Issue for This Court to Decide.

To be sure, this Court is not bound to adhere to the Ninth Circuit's *Portland* decision. Notwithstanding the lower court's correct application of *Neal*, this Court could engage in its own *Chevron* analysis of the FCC's *Declaratory Ruling* if it so chooses. There is, however, no compelling *Chevron* issue for this Court to settle.

The threshold question in any *Chevron* analysis is whether the statutory provisions in question are ambiguous, but there is no statutory ambiguity in this case. All parties agree that cable modem service includes a "telecommunications" component under the '96 Act. The Act, as noted earlier, defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public." Cable modem service is heavily marketed directly to the public and nothing in the Act suggests that the transmission service "offering for a fee to the public" loses its regulated character by being bundled with an information service. Not surprisingly, the Ninth Circuit's earlier *City of Portland* decision did not find the statute in question ambiguous, a point the lower court expressly noted in *Brand X*. On the contrary, the lower court in *City of Portland* found no need to look, by its own description, beyond the "plain language" of the '96 Act, 216 F.3d at 876 and, for corroboration, found its interpretation consonant with the 1998 interpretation of the same statutory provisions applied by the FCC itself to analogous DSL service. *Id.* at 879. Even if petitioners were to clear the ambiguity hurdle, however, the FCC has not presented much of a case for deference.

When an agency changes its long-standing interpretation of a statute, its latter interpretation is "entitled to considerably less deference." *Good Samaritan Hospital v. Shalala*, 508 U.S. 402 (1993), citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n. 30 (1987). *See also Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 698 (1991). This is precisely the case where, as here, a conflicting 1998 agency interpretation applied to analogous DSL service (*Deployment of Wireline, supra*) was not only more nearly contemporaneous with the statute,[67] but has its roots in the decades-old agency policy (*Computer II*) that formed the very basis for the statutory provisions in question.[68]

Compounding the FCC's credibility problem, the *Declaratory Ruling* and the *Wireline Broadband NPRM* – issued only a month apart -- offer conflicting explanations for the same statutory conclusion. While a change in an agency's interpretation of a statute is not "fatal" to its claim of deference, *Smiley v. Citibank (South Dakota), N.A.*, 517 U.S. 735, 742 (1996), it must at least offer a reasoned explanation for its change in course. *Id.* In explaining its cable modem ruling, however, the FCC asserts that the *Computer II*

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[67] An administrative "practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978), *quoting Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294, 315 (1933). *See also Watt v. Alaska*, 451 U. S. 259, 272-73 (1981) (holding that agency's interpretation of amendment that was contemporaneous with amendment's passage was entitled to considerably more deference than agency's current, inconsistent interpretation).

[68] *See, e.g., NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974) ("great weight" is to be accorded "longstanding interpretation placed on a statute by an agency charged with its administration. This is especially so where Congress has reenacted the statute without pertinent change.") *See also, Smiley, supra*, 517 U.S. at 740 ("agency interpretations that are of long standing come before us with a certain credential of reasonableness, since it is rare that error would long persist"). In this case, the longstanding agency *Computer II* policy was codified in the '96 Act's definitions of "telecommunications service" and "information service."

framework incorporated into the '96 Telecommunications Act was only intended to apply to telephone lines (*Declaratory Ruling* at ¶ 44) – despite the express language in the Act stating that transmission service was transmission service "regardless of the facilities used." 47 U.S.C. § 153(46). Besides, it claims, the "telecommunications component is not, however, separable from the data processing capabilities of the service," but instead constitutes one integrated information service. *Declaratory Ruling* at ¶39. Seeking to declare bundled DSL and Internet access an unregulated information service too, it offers a completely contradictory explanation. Since DSL *is* provided using telephone wires it cannot claim that the nature of the facilities makes *Computer II* inapplicable. And, since the FCC had for years been requiring telephone companies to offer DSL unbundled from data processing, it could not very well argue that the two components formed an inseparable whole. Instead, it explained that the *Computer II* framework of the '96 Act was inapplicable to DSL because *Computer II* was only intended to apply to narrowband, not broadband. *Wireline Broadband NPRM* at ¶ 36. This, too, was a hard sell since the FCC had already ruled in 1998 that the '96 Act *did* apply the *Computer II* framework to broadband. *Brand X Internet Services*, 345 F.3d at 1137.

If a lower court's proper application of *Neal* is to have any import at the level of Supreme Court review, its reasonable prior interpretation of a statute must also detract from any deference the agency might otherwise be due.[69] This is particularly important in the context of litigation under the '96 Telecommunications Act, where the statute expressly contemplates private causes of action[70] and where

[69] The *Portland* decision, moreover, was binding on litigants in the Ninth Circuit. *See e.g., GTE.Net LLC v. Cox Communications, Inc.*, 185 F. Supp. 2d 1141 (S.D. Cal. 2002). A changed agency interpretation that "does not take account of legitimate reliance on prior interpretation" may also be arbitrary. *See, e.g., Smiley, supra*, 517 U.S. at 740.

[70] *See, e.g.*, 47 U.S.C. § 207 (2004).

judicial interpretations of the statute without benefit of prior agency interpretations are therefore inevitable. To top all of this off, the agency and the Solicitor General are asking this Court to give deference to a statutory interpretation that the Solicitor General's office found unreasonable just nine months ago. The Solicitor General apparently only goes along with the FCC now because the FCC has announced a brand new interpretation of CALEA that, if upheld, would allow the government to conduct electronic surveillance over cable modem service, notwithstanding its classification as an information service under the '96 Act.

In weighing whether to grant certiorari, the Court should further keep in mind that when the Ninth Circuit had before it the petitions for rehearing en banc submitted by the FCC and the NCTA it was free to revisit the correctness of its earlier *City of Portland* decision, but chose not to do so. This was hardly a surprising decision, as neither petitioner argued – and still have not argued – that *City of Portland* was incorrectly decided. In fact, not a single member of the court voted to poll other members on whether to hear the case en banc.

Finally, and this is no small point, the FCC's interpretation, as the Solicitor General's office has itself argued, is simply unreasonable. The FCC's position, in brief, is that a company owning telecommunications facilities – even one owning an absolute monopoly over such facilities – can escape the regulation of any telecommunications service it chooses to offer the public over such facilities by simply packaging the service with an unregulated "information service." Not only is there nothing in the '96 Act stating that "telecommunications service" loses its regulated character *unless* it is offered separately, the very notion that such a requirement could reasonably be read into the statute is preposterous. In the words of one commentator, the FCC's bundling rationale is part of a "deregulatory quest" that allows "all telecommunications service providers the ability

to free themselves of any and all common carrier burdens."[71] As the FCC itself has said in applying *Computer II*, under such an interpretation a common carrier "would be able to avoid *Computer II* and *Computer III* unbundling and tariffing requirements for any basic service that it could combine with an enhanced service." "This," it wisely concluded, "is obviously an undesirable and unintended result."[72] *Mississippi River Transmission Corp. v. FERC*, 969 F.2d 1215 (D.C. Cir. 1992), a case involving analogous provisions of the Natural Gas Act, is to similar effect. There, the D.C. Circuit upheld the Federal Energy Regulatory Commission's jurisdiction to regulate interstate transportation of natural gas sold under a bundled arrangement:

> FERC is not barred from regulating a pipeline's interstate transportation of natural gas merely because the sale of gas being transported is not itself subject to federal regulation. FERC's authority over such transactions is beyond dispute.

Id. at 1217. Any other rule, the court observed, would invite manipulation by the utility, which could avoid regulation by offering bundled pricing of the same services:

> As far as the statute is concerned, there would have been no doubt of FERC's section 1(b) authority if MRT, instead of charging a bundled price, had charged separately for transporting the gas and for the gas itself. *To accept MRT's position would therefore be tantamount to conferring on private parties the power whether FERC could set the rate for interstate transportation.* Private parties would have this power because it would be entirely up to them whether to structure a direct sale and interstate transportation in terms of a bundled price or separate charges.[73]

[71] Rob Frieden, *Adjusting the Horizontal and Vertical in Telecommunications Regulation: A Comparison of the Traditional and New Layered Approach*, 55 Fed. Comm. L.J. 207, 230 (2003).
[72] *Frame Relay Order*, *supra* 10 F.C.C.R. 13719.

Granting Certiorari Would Send the FCC a Signal That It Can Circumvent the Statutory Requirements For Exercising Its Forbearance Authority.

Maislin, *Lechmere* and *Neal* aside, this is a particularly poor vehicle for Supreme Court de novo review under *Chevron* of the FCC decision the Ninth Circuit reversed. Despite the observation by two members of this Court that the FCC has avoided the question "no less than six times in recent years," *NCTA v. Gulf Power Co.*, 534 U.S. 327, 357, (2003) (Thomas, J. and Souter, J. concurring and dissenting), the FCC consciously chose to not to classify cable modem service – engaging in years of deregulation by inaction – de facto forbearance – as a means to encourage broadband deployment rather than invoking its forbearance authority if it thought regulation was unnecessary.

On brief, the FCC argues that review is needed now because "the possibility that the Commission might forbear from applying certain telecommunications service requirements is no substitute for correctly classifying cable modem service in the first instance." FCC Pet. at 27. "Forebearance proceedings," it adds, "would be time-consuming and hotly contested." *Id.* at 28. It bears no small emphasis that in its 2002 *Declaratory Ruling*, after compiling a comprehensive record on the issue, the FCC already made a tentative decision to forbear from regulating cable modem service, *Declaratory Ruling* at ¶¶ 94, 95, a decision it remains empowered to finalize at any time – essentially mooting the case if it so wishes. The FCC's concern that the factual showing needed to support that tentative decision (a decision it already presumably thought supportable from the facts

[73] *Id.* at 1218 (emphasis added). This Court too, has affirmed a similar exercise by the FERC's predecessor, the Federal Power Commission, over the transportation component of a direct sale of natural gas. *See FPC v. Louisiana Power & Light Co.*, 406 U.S. 453 (1972).

before it) may be time consuming to develop, that the case for forbearance may be difficult to establish and that "there is no way to predict in advance the ultimate outcome of such proceedings," seems more a plea that it should be permitted to circumvent the cumbersome statutory forbearance process than an articulation of a legal principle worthy of Supreme Court review. The "time-consuming" process about which it complains is precisely the vehicle chosen by Congress to ensure that forbearance is "consistent with the public interest." 47 U.S.C. § 160(a)(3). To grant certiorari here would send a message to agencies that they could ignore their duty to administer statutes without fear that they would be bound by the decisions of courts forced to act in the face of the agency's conscious inaction.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

Andrew J. Schwartzman

Counsel for Center For Digital Democracy

Harvey L. Reiter
Matthew J. Verschelden
Counsel for Brand X Internet Services

September 30, 2004

APPENDIX

[Logo]

CALEA Implementation Unit
14800 Conference Center Drive
Suite 300
Chantilly, Virginia 20151

November 25, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
(CC Docket Nos. 02-33, 95-20 and 98-10; CS Docket No. 02-52)

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.106(b), the Federal Bureau of Investigation ("FBI") hereby submits notice of an *ex parte* meeting on November 24, 2003.

The FBI representatives who attended the meeting were Supervisory Special Agent Gregory M. Milonovich of the FBI's CALEA Implementation Unit and Martin J. King of the FBI's Office of General Counsel. Also participating in the meeting on behalf of the FBI were Joel M. Margolis, Valerie M. Furman and Kevin D. Minsky, consultants to the FBI's CALEA Implementation Unit.

The Commission staff members who attended at the meeting were Julius Knapp, Geraldine Matisse, Jerome Stanshine and Jeffrey Goldthorp of the Office of Engineering and Technology, J. Scott Marcus of the Office of Strategic Planning, Susan Aaron of the Office of the General Counsel, Cathy Zima, David Ward, Thomas J. Beers, Michael Goldstein, and Alan Feldman of the Wireline Competition Bureau, and Stanley Wiggins, William Lane, and John Spencer of the Wireless Telecommunications Bureau.

The purpose of the meeting was to discuss the Communications Assistance for Law Enforcement Act ("CALEA"), 47 C.F.R. § 1001 *et seq.*, in the context of the above-referenced dockets.[1] The attached memorandum summarizes the substance of the meeting.[2]

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[1] See In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

[2] At the request of members of the FCC's staff, Mr. Milonovich also provided the Commission with a brief update regarding a recently-issued FBI publication that details law enforcement's electronic surveillance needs for public Internet protocol network access service (PIPNAS).

Respectfully submitted,
THE FEDERAL BUREAU OF INVESTIGATION

/s/ Gregory M. Milonovich
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David Ward (via electronic mail)
Thomas J. Beers (via electronic mail)
Michael Goldstein (via electronic mail)
Alan Feldman (via electronic mail)
Stanley Wiggins (via electronic mail)
William Lane (via electronic mail)
John Spencer (via electronic mail)

SUMMARY OF POINTS MADE
IN FEDERAL BUREAU OF INVESTIGATION
NOVEMBER 24, 2003 *EX PARTE* PRESENTATION

- The purpose of the Communications Assistance for Law Enforcement Act ("CALEA"), 47 C.F.R. § 1001 *et seq.*, is to ensure that lawful electronic surveillance keeps pace with changes in telecommunications technology as telecommunications services migrate to new technologies.
- CALEA's application is technology neutral.
- Internet access service is an important emerging technology used for electronic communication.
- Internet access service can be used to deliver a wide variety of communications, including voice-over-internet-protocol ("VOIP") service, which is functionally identical to traditional telephony, as is expected to replace the existing circuit switched network.
- The Commission has already prepared itself to apply CALEA to emerging technologies by stating in the *CALEA Second Report and Order* that it would preserve the CALEA definitions of "telecommunications service" and "information service," despite the independent purposes of the Communications Act.
- The Commission is required by Section 229 of the Communications Act, 47 C.F.R. § 229, to make all rules necessary to fulfill the statutory goals of CALEA.
- The intent of CALEA is to require the Commission to adopt rules making Internet access service providers subject to CALEA.
- There are multiple legal theories under which the Commission can preserve the CALEA classification scheme and ensure CALEA coverage of Internet access service:
  - The Commission can classify Internet access service as a "telecommunications service";

  - The Commission can find – consistent with both its prior pronouncement that CALEA covers digital subscriber line service as a joint use facility and the Ninth Circuit Court's recent holding in the *Brand X* case – that Internet access contains both a "telecommunications service" and an "information service."
  - The Commission can classify Internet access service providers as CALEA "telecommunications carrier."
  - The CALEA definition of "telecommunications carrier" is different from and broader than the Communications Act definition of that term, thus permitting a different and broader interpretation.
  - CALEA never classified Internet access service as an "information service."
  - The CALEA definition of "information service," combined with CALEA's legislative history, indicates Internet access service should be covered by the statute.
- No matter what theory the Commission chooses to use to fulfill its obligation to preserve the CALEA definitions, it may not classify Internet access service as a pure "information service" because that could arguably overturn the CALEA definitions and impermissibly interpret CALEA in a manner that would defeat its purpose.
- Any ruling that permits Internet access service providers to escape their CALEA responsibilities would frustrate the ability of law enforcement agents to keep pace with this emerging technology.
  - By implication, such a ruling could ultimately block law enforcement from conducting CALEA-enabled lawful electronic surveillance on the Internet-based communications services of the future.

- Given Chairman Powell's statement that Homeland Security is at the forefront of his policy goals for the Commission, ensuring CALEA coverage of Internet access should be his top priority in the pending Internet access proceedings.

(5) (6)

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

and

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

OPPOSITION BRIEF OF RESPONDENT EARTHLINK, INC.

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September 30, 2004

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QUESTION PRESENTED

Whether the "telecommunications" component of cable modem service meets the statutory definition of a "telecommunications service" under the Communications Act by virtue of being offered: (1) for a fee, and (2) to the public.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent EarthLink, Inc. submits the following corporate information:

1. EarthLink, Inc. is a publicly traded company engaged primarily in the business of providing Internet access and related value-added services to business and residential customers nationwide. EarthLink, Inc. has no parent company and no wholly-owned subsidiaries.

2. Sprint Corporation is a publicly traded corporation that has an ownership share in EarthLink, Inc. equal to or in excess of 10 percent. There are no other publicly traded companies that have ownership shares in EarthLink, Inc. of 10 percent or greater.

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IN THE

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BRAND X INTERNET SERVICES, *et al.*,
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On Petitions for Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

OPPOSITION BRIEF OF RESPONDENT EARTHLINK, INC.

The petitions: (1) fail to assert that the court below read the statute incorrectly; (2) fail to identify any ambiguity that would justify the deferential standard of review that the petitioners seek; (3) fail to identify any conflict between the decision below and any decision of this Court or any decision of any court of appeals; and (4) fail to identify any legitimate regulatory policy that would be thwarted by the decision below. The petitions should be denied.

COUNTER-STATEMENT

1. Internet use is fast becoming as ubiquitous as the use of voice telephony. Indeed, with the recent growth of so-called "voice over Internet protocol," the standard packet-switched data transmission methods that have supported the Internet since its inception may soon represent the primary transmission medium for all types of communications, be they voice, video, or data. *See IP-Enabled Services*, 19 F.C.C.R. 4863, 4864-4868, paras. 1-5 (2004).

The Internet has been described as a "network of networks," *see* Frank J. Derfler, *How Networks Work* 187 (6th ed. 2003), made up of computers connected by transmission lines. The "intelligence" of the Internet—its ability to process, store, generate, and transform information—lies at the ends of the transmission lines in the computers that those transmission lines connect. However, it is not the individual computers at the edges of the Internet that give the medium its power. Instead, the revolutionary power of the Internet derives from the fact that those computers are all ultimately connected to one another. *See Reno v. American Civil Liberties Union*, 521 U.S. 844, 849 (1997) ("The Internet is an international network of interconnected computers."). It is the transmission links that make the pieces function as a single, if amorphous, whole.

The FCC adopted the following definition of the Internet in the Declaratory Ruling at issue here:

> For purposes of this proceeding, we use the definition of the Internet that has been adopted by the Federal Networking Council: "'Internet' refers to the global information system that—(i) is logically linked together by a globally unique address space based on the Internet Protocol (IP) or its subsequent extensions/follow-ons; (ii) is able to support communications using the Transmission Control Protocol/Internet Protocol (TCP/IP) suite or its subsequent extensions/follow-ons, and/or other IP-compatible protocols; and (iii) provides, uses or makes accessible, either publicly or privately, high level services layered on the communications and related infrastructure described herein."

FCC Pet. App. at 41a n.25. The Commission below coined the phrase "cable modem service" to describe "a service that uses cable system facilities to provide residential subscribers with high-speed Internet access, as well as many applications or functions that can be used with high-speed Internet access." FCC Pet. App. at 86a. The Commission's term thus includes both the transmission functions and the "high-level services layered on the communications and related infrastructure" described in its definition of the Internet. This case is about whether the transmission lines that millions of subscribers use to send and receive information over the Internet are common carrier networks, and thus fall within the authority of the Commission under Title II of the Communications Act.

2. The Communications Act states that:

> The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

47 U.S.C. § 153(20). The parties agree that "Internet access service" has both an information processing component and a transmission component. The parties also agree that the first component is an "information service" under the Communications Act. Because that definition only includes computer processing services that are provided "via telecommunications," the parties also necessarily agree that the statute compels the conclusion that the "information service"

known as Internet access service has a "telecommunications" component. *See* FCC Pet. at 17.

The issue directly decided by the Ninth Circuit in *Brand X Internet Services v. FCC*, FCC Pet. App. at 1a-39a, and the sole substantive issue raised by the FCC and the cable petitioners here, is whether the "telecommunications" that all parties agree is a component of cable modem service also meets the Communications Act's definition of "telecommunications service."

3. The Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Whether a given form of telecommunications is a telecommunications service is of critical importance under the Communications Act. The Act defines a "telecommunications carrier" as "any provider of telecommunications service," and further provides that "[a] telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services . . . ." 47 U.S.C. § 153(44). Thus, the extent to which a cable modem service provider is a common carrier depends on the extent to which the telecommunications component of cable modem service meets the "for a fee directly to the public" test of the "telecommunications service" definition.

4. It is only with respect to common carriers that the Act states that "[i]t shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor . . . ." 47 U.S.C. § 201(a). Because they do not own transmission networks that would allow them to provide their own connections between their customers' homes and the Internet "backbone," independent Internet service providers ("ISPs") must be able to purchase transmission

services from network operators if those ISPs are to be able to provide service at all. If cable companies are not common carriers with respect to the transmission component of the "cable modem service" that they provide to millions of customers on standard terms, then they are not required under the statute to sell that transmission to independent ISPs. Today, with the exception of certain transmission sales that have been mandated by cable company merger conditions, cable companies generally do in fact refuse to sell transmission to independent ISPs.

5. ISPs have for years urged the Commission to express its views regarding the statutory classification of cable modem service. As of 2002, the Commission had had the opportunity "no less than six times in recent years" to answer this classification question. *See National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 356 (2002) (Thomas, J., dissenting in part and concurring in part). Until the Declaratory Ruling that gave rise to this case, however, the Commission declined to do so. The silence of the Commission, along with the consistent refusal of cable modem service providers to sell transmission to independent ISPs, has resulted in a de facto forbearance from the enforcement of Section 201 of the Act with respect to this cable-based transmission service, a service over which the majority of high-speed Internet connections are made in this country. *See Availability of Advanced Telecomms. Capacity in the United States*, FCC 04-208, Fourth Report to Congress (Sept. 9, 2004) at 16 (showing that cable represents 75% of over 20 million total broadband subscribers).

ISPs sought to bypass the recalcitrant Commission by invoking the Act's Section 406 authority to bring private actions in federal district court to compel the delivery of service by a common carrier on non-discriminatory terms. *See* 47 U.S.C. § 406. Those parties were met by court orders deferring action under the doctrine of primary jurisdiction.

See, e.g., GTE.Net LLC v. Cox Communications, Inc., 185 F. Supp. 2d 1141 (S.D. Cal. 2002).[1] Because the Commission refused to act, those cases languished, leaving ISPs that were denied service no meaningful judicial or administrative forum in which to press their requests for relief.

6. With the Commission refusing to acknowledge that cable broadband transmission was a common carrier service, a number of local cable franchising authorities sought to impose—as a condition of approving cable company mergers—a requirement that cable companies sell cable-based transmission to unaffiliated ISPs. Cable companies challenged that requirement in court. One such case reached the Ninth Circuit, which addressed the statutory classification of cable modem service in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000). The *Portland* court first determined that cable modem service is not a "cable service" under the Act, thus obviating the need for AT&T to hold a cable franchise to provide the service. *Id.* at 877. The court held, however, that in order to determine whether the franchise transfer condition requiring common carrier offering of transmission service to independent ISPs was prohibited by the Communications Act, it must affirmatively determine the Communications Act's classification of cable

[1] As the caption indicates, GTE.Net LLC, which is one of the Verizon companies that has filed in support of the petitions here, was a plaintiff in the Section 406 action against Cox. In the district court, "[p]laintiffs argue[d] that the obligations contained in the Act require a common carrier to supply the high-speed cable connection to all requesting ISP's [sic] on nondiscriminatory terms and conditions. *See* 47 U.S.C. §§ 201(a) and (202)(a)." *GTE.Net*, 185 F. Supp. 2d at 1144; *see also MediaOne Group, Inc. v. County of Henrico*, 257 F.3d 356, 364 (4th Cir. 2001) (Verizon urging same proposition). Verizon's position that the Ninth Circuit's reading of the Act is a "gross misinterpretation," Verizon Brief at 1, appears to be recently adopted.

modem service. *Id.* In making that analysis, the court found that:

> Like other ISPs, @Home consists of two elements: a pipeline (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. *However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.*

Id. at 878 (emphasis added). The FCC participated as amicus curiae in *Portland*, but declined to provide the court with its view as to the proper statutory classification of cable modem service. *Id.* at 876.

7. *Portland* was decided in June of 2000. Three months later the Commission issued a notice of inquiry to address the classification and regulatory issues associated with "cable modem service," the name the Commission gave to the bundled offering of broadband transmission and Internet access service. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19,287 (2000). In March of 2002, the FCC issued a Declaratory Ruling in which it held that "[c]able modem service is not itself and does not include an offering of telecommunications service to subscribers." FCC Pet. App. at 95a. Seven petitions for review were filed in three circuits, including EarthLink's petition filed in the D.C. Circuit. EarthLink's petition challenged the Commission's holding that cable modem service "does not contain an offering of telecommunications service" along with two subsidiary holdings that related directly to the FCC's classification decision. The petitions were consolidated and assigned to the Ninth Circuit by lottery by the Judicial Panel on Multidistrict Litigation.

8. In *Brand X*, the per curiam court held that its reading of the Communications Act in *Portland* controlled its review of the FCC's Declaratory Ruling:

> Our holding in *Mesa Verde*, along with that of the Supreme Court in *Neal*, requires our adherence to the interpretation of the Communications Act we announced in *Portland*. There, we concluded that cable broadband service was not a "cable service" but instead was part "telecommunications service" and part "information service."

FCC Pet. App. at 21a.

Judge O'Scannlain issued a concurrence in which he concluded that "in light of our holding in *Mesa Verde*, we are bound by our own interpretation of the Telecommunications Act in *Portland* and must vacate the FCC's Declaratory Ruling." *Id.* at 22a. He went on, however, to state that:

> [A]dherence to *stare decisis* in the present case—coming as it does in a decision that determines the outcome of seven different petitions for review from three different circuits consolidated and assigned randomly to this court by the Judicial Panel on Multidistrict Litigation—appears to aggrandize, rather than limit our power over an admittedly complicated and highly technical area of telecommunications law.

Id. at 23a-24a (O'Scannlain, J., concurring).

Judge Thomas, the author of the *Portland* decision, also issued a separate concurrence. He explained that he would have reached the same result even if the agency had interpreted the statute before the Ninth Circuit decided *City of Portland*:

> I write separately to underscore my conclusion that *City of Portland* was correctly decided. Considered in its entirety, the 1996 Telecommunications Act compels the

> conclusion that cable modem service contains a telecommunications service component.
>
> This is not a case that implicates *Chevron* deference, not only for the reasons noted in our unanimous opinion, but also because it is a question of pure statutory interpretation. In reviewing an administrative agency's construction of the statute it administers, we must consider first "whether Congress has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "If Congress has done so, the inquiry is at an end; the court 'must give effect to the unambiguously expressed intent of Congress.'"
>
> * * *
>
> In *City of Portland*, we engaged in this analytical exercise and concluded that Congress meant what it said in defining "telecommunications." We did not discern any ambiguity in the statutory meaning for the agency to interpret; thus, *Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*.

Id. at 25a-27a (Thomas, J., concurring) (internal citations omitted).

9. On December 4, 2003, the FCC, without being joined by the United States, filed a petition for rehearing and rehearing en banc. The FCC urged the en banc court to rehear the case in order to apply the test set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). The cable industry filed a petition urging the same ground for rehearing. Only Judge O'Scannlain of the panel voted to grant the suggestions for rehearing en banc. The full court was "advised of the petitions for rehearing en banc and no active judge requested a vote on whether to rehear the matters en banc." FCC Pet. App. at 207a. The

petitions for rehearing en banc were denied on March 31, 2004. Thereafter, the Acting Solicitor General requested and obtained two separate extensions of time, until August 30, 2004, in which to petition for certiorari.

10. On December 8, 2003, while the en banc petitions were pending, the Department of Justice, specifically noting the participation of the Office of the Solicitor General, the Federal Bureau of Investigation, and the Drug Enforcement Administration, submitted a letter to the FCC summarizing a meeting among DOJ personnel and FCC personnel. The letter addresses the proper statutory classification of Internet access and its implications for whether the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. §§ 1001 *et seq.*, applies to Internet-based communications. In that letter, DOJ directly contradicted the interpretation now offered to this Court by the government:

> Law Enforcement advanced the theory that Internet access service is a "telecommunications service," or at least contains a "telecommunications service" that implicates the CALEA statute.
>
> * * *
>
> Law Enforcement also stated its belief that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA.

Earthlink Opp. App. at 14a.[2]

[2] The DOJ's objection to the FCC's ruling that cable modem service is solely an information service arises from the fact that CALEA contains two separate exclusions for providers of "information services." *See* 47 U.S.C. § 1001(8)(C) (excluding from the definition of "telecommunications carrier" "persons or entities insofar as they are engaged in providing information services") *and* 47 U.S.C. § 1002(b)(2)(A) (stating that the intercept capability requirements of CALEA "do not apply to . . . information services"). The operative portions of the definition of

11. On August 9, 2004, the Commission issued a notice of proposed rulemaking in a docket captioned *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 69 Fed. Reg. 56976 (2004). There, the FCC again faced the question of the proper statutory classification of broadband Internet access services. Despite the fact that the FCC held in the Cable Modem Declaratory Ruling that cable modem service is *solely* an information service under the Communications Act, it tentatively concluded in its CALEA proceeding that the same service can *never* be an information service under an identically defined term in CALEA, a statute that predates the Telecommunications Act of 1996 by two years:

> For purposes of the Communications Act, the Commission has concluded that cable modem service is an information service and has tentatively concluded that wireline broadband Internet access is also an information service. Assuming those determinations become final, those services would, nonetheless, have to be evaluated under CALEA's separate definition of "telecommunications carrier" which, as discussed above, is broader than the definition in the Communications Act. Where a service provider is found to fall within CALEA's Substantial Replacement Provision it would be deemed a "telecommunications carrier" for purposes of CALEA to which CALEA obligations would apply. If, at the same time, we interpreted CALEA's Information Services Exclusion to apply, it would present an irreconcilable tension; that is, particular service providers would find themselves at the same time subject to CALEA under the Substantial Replacement Provision and exempted from it by virtue of the Information Services Exclusion. We believe that the better reading of the statute is to

"information services" in CALEA, 47 U.S.C. § 1001(6), and the definition of "information service" in the Communications Act, 47 U.S.C. § 153(20), are identical. EarthLink Opp. App. at a-10a, 1a.

> recognize and give full effect to CALEA's broader definition of "telecommunications carrier" *and to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing information services for purposes of CALEA.*

Id. at 56979 (emphasis added).

12. On August 27, 2004, the Acting Solicitor General filed a petition for certiorari on behalf of the United States and the FCC. On August 30, 2004, the cable industry filed its petition. Verizon, BellSouth, and SBC (the "telephone companies") have filed in support of the petitions.

REASONS FOR DENYING THE PETITION

SUMMARY OF ARGUMENT

The FCC offers three reasons why the petition should be granted. First, the FCC argues that its conclusion that cable modem service is solely an information service is a permissible construction of the statute that is entitled to deference under step two of *Chevron*. Second, it argues that the Ninth Circuit misconstrued this Court's precedent and exacerbated a circuit conflict relating to the relationship between stare decisis and *Chevron* step-two deferential review. Third, the FCC argues that the classification of cable modem service is an issue of exceptional national importance. The cable industry urges the same grounds, although it presents them in a different order. Although EarthLink's arguments in opposition are stated primarily in terms of the FCC's petition, they apply with equal force to the cable industry's petition and the telephone companies' briefs in support.

The Commission's first two grounds for granting the petition are premised on the assumption that this is a *Chevron* step two case, that is, that there is some ambiguity in the statute through which Congress has delegated authority to the

Commission to fill in the gap. *See Chevron*, 467 U.S. at 843-845. As the per curiam court and Judge Thomas in his concurrence explained in *Brand X*, *see* FCC Pet. App. at 19a, 27a, and as the plain language of the statute itself demonstrates, the premise that the statute is ambiguous is simply wrong. Accordingly, the Commission's first two arguments fail because they depend on a fundamental assumption that is incorrect.

The Commission's final argument is that the classification of the transmission component of cable modem service is a question of exceptional national importance. The question is important, but Congress answered it in 1996 by declaring that the offering of telecommunications to the public for a fee "shall be treated as a common carrier" service. 47 U.S.C. § 153(44). At the same time, Congress provided the Commission with broad authority under Section 10 of the Act to tailor or eliminate common carrier regulations when specific criteria are met. Thus, there is no open legal question that requires this Court's intervention.

The Commission seeks to avoid the definitional language that answers the question presented by redirecting the Court's attention to selective quotations from Section 706 of the Telecommunications Act of 1996 and Sections 230 and 254 of the Communications Act. The Commission itself has held that Section 706 is not an independent grant of authority. Moreover, that section directs the Commission to encourage advanced telecommunications capability by using "price cap regulation, [and] regulatory forbearance," tools applicable only to common carriers. *See* 47 U.S.C. § 157 nt. Section 230 deals with protections for offerors of devices to filter out pornography on the Internet. *See* 47 U.S.C. § 230. It says nothing about the proper application of the core defined terms "information service," "telecommunications," and "telecommunications service." Likewise, Section 254 focuses on the provision of universal service, which Congress defines in

Section 254(c) as an "evolving level of telecommunications service." 47 U.S.C. § 254(c). The Commission concludes its argument regarding national importance by stating that it finds the means specifically provided by Congress for relieving common carriers of unnecessary burdens—Section 10 of the Act—to be inconvenient. That is no reason at all.

ARGUMENT

I. THE STATUTE COMPELS THE CONCLUSION THAT THE "TELECOMMUNICATIONS" COMPONENT OF CABLE MODEM SERVICE IS A "TELECOMMUNICATIONS SERVICE."

Three defined terms in the Communications Act govern the issue presented here: "information service," "telecommunications," and "telecommunications service." *See* EarthLink Opp. App. at 1a-2a.

The parties agree that Internet access is at least in part an "information service." *See* FCC Pet. at 17 ("The Commission had previously concluded that Internet access service 'is appropriately classified as an information service . . . .'"). The parties also agree that, because information service by definition is provided "via telecommunications," there is by definition a "telecommunications" component to Internet access. *See* FCC Pet. at 18 ("The Commission recognized that '[a]ll information services require the use of telecommunications' to enable customers to interact with information.") (alteration in original). The only remaining question is whether the "telecommunications," *see* 47 U.S.C. § 153(43), that the parties agree is a statutory component of information service is also a "telecommunications service." The definition of "telecommunications service" answers that question in the affirmative.

The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be

effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Telecommunications service is thus a subset of telecommunications; it is telecommunications that is offered (1) for a fee, and (2) to the public. There is no contention by any party that cable companies do not charge for cable modem service, or that part of the fee collected does not go to pay for the high-speed transmission that is the capability that induces customers to purchase this service even though dial-up or "narrow-band" service is two to four times cheaper. Nor can there be any doubt that the service is offered "directly to the public." As the FCC points out, "[a]s of December 2003, there were 16.4 million cable modem lines in use," surpassing dial-up connections for the first time. FCC Pet. at 25. The service, of course, is available and marketed to many more people than have actually signed up.

The facts that the service at issue by definition includes "telecommunications," and that the entire service is being offered for a fee to the public, should end the analysis. Both factors that differentiate the admittedly present "telecommunications" from "telecommunications service" have been met, and cable modem service therefore includes a "telecommunications service."

The FCC never conducted the simple, statutorily compelled analysis described above.[3] Instead, the FCC simply decreed that there was an ambiguity, although it never said which words of the relevant definitions were susceptible to more than one reasonable reading.[4] It then proceeded to announce

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[3] As EarthLink argued in the Ninth Circuit, the FCC's failure to apply or even acknowledge the clear two-part test set forth in the statute provides an independent ground for vacating the Declaratory Ruling. *See Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1, 9 (D.C. Cir. 2000).

[4] To the extent that the Commission suggests that the lack of a specific reference to "cable modem service" in the statute constitutes an ambiguity, *see* FCC Pet. at 16, the argument is without merit. *See generally U.S.*

its interpretation that the Act does not classify the mass-market transmission service over which broadband Internet access is delivered as a common carrier "telecommunications service."

The Commission now claims that its interpretation should be given *Chevron* step two deference. "Deference under *Chevron* to an agency's construction of a statute that it administers is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill the gaps." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). Especially in light of the fact that under Section 10 of the Act, 47 U.S.C. § 160, Congress *expressly* delegated authority to the FCC to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or a class of telecommunications carriers or telecommunications services," it is a mighty stretch for the FCC to assert that Congress also delegated to the agency the power to decide who is and who is not a common carrier in the first place. It is an even further stretch for the Commission to assert that Congress delegated such a power through its silence.

Common carriage is the organizing principle of the Act, and at least one court of appeals has held that the Commission has limited discretion to say who is and who is not a common carrier. *See National Ass'n of Regulatory Utility Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976) ("The common law definition of common carrier is sufficiently definite as not to admit of agency discretion in the classification of operating communications entities. A particular system is a common carrier by virtue of its functions, rather than because it is declared to be so.").

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v. Monsanto, 491 U.S. 600, 608-09 (1989) (failure to mention a particular application of a statutory term "'does not demonstrate ambiguity' in the statute: 'It demonstrates breadth.'" (internal citations omitted)).

This Court, with respect to tariff filing under the Communications Act, ruled that the power of the Commission to "modify" tariff filing requirements under the pre-1996 Communications Act was not a delegation to the FCC to eliminate tariff filing: "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 (1994). The concept of common carriage is even more fundamental to the Act than is tariff filing (which the Commission has for many carriers eliminated after 1996 using its Section 10 authority[5]), and the presumption against silent delegations of fundamental policy decisions is therefore at its strongest here. In addition, there is an exception in the Act that proves the rule that it is Congress, not the Commission, that determines who is a common carrier. The definition of "telecommunications carrier" states that such an entity "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, *except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage*." 47 U.S.C. § 153(44) (emphasis added). In short, there is nothing to indicate that Congress intended a silent delegation of the magnitude the Commission suggests.

Turning to the specifics of the FCC's interpretation, the agency makes two arguments in support of its alternative reading. The first is that the telecommunications here involved is not offered as a "separate" or "stand-alone" service. *See* FCC Pet. at 18. The second is that cable modem service providers do not "offer" telecommunications to the public,

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[5] *See, e.g., MCI WorldCom v. FCC*, 209 F.3d 760 (D.C. Cir. 2000).

but instead "use" telecommunications to provide an information service. *Id.* at 19. Neither argument can be squared with the statute.

A. The Communications Act Does Not Require That "Telecommunications" Be Offered on a "Separate" or "Stand-Alone" Basis in Order to Be "Telecommunications Service."

The FCC asserts "that the mere transmission of information does not constitute a 'separate 'telecommunications service'' absent a 'stand-alone offering of transmission for a fee directly to the public.'" FCC Pet. at 18 (internal citations omitted). The most obvious problem with this argument is that the definition of "telecommunications service" does not by its terms require a "separate" offering of telecommunications, and the agency has no power to add words to the statute. *See U.S. v. Calamaro*, 354 U.S. 351, 359 (1957) (agency may not add to the statute "something which is not there").[6] Courts operate under the same constitutional restriction. *See Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993) ("[W]e may not add terms or provisions where congress has omitted them"). Moreover, where Congress intended the charging of a separate fee to have some statutory significance, it said so. *See* 47 U.S.C. § 153(48) (defining "telephone toll service" as "telephone service between stations in different exchange areas *for which there is made a separate charge* not included in contracts with subscribers for exchange service.") (emphasis added).

[6] Verizon takes the art of adding words to the statute to a new level. It states (with the emphasis in Verizon's brief) that: "In order to qualify as a 'telecommunications *service*,' on the other hand, a transmission function must be offered *as a separate service* for a fee to a specified class of users. *Id.* § 153(46) (emphasis added)." Verizon Brief at 9. The combination of the direct citation to the definition and the notation of "emphasis added" is plainly intended to leave the impression that the emphasized words are in the statute. They are not.

In addition to the fact that the statute will not allow the FCC's construction, the FCC has itself consistently rejected the argument that bundling a regulated common carrier service with an unregulated information service somehow renders the common carrier service unregulated. The rule was firmly established before the enactment of the Telecommunications Act of 1996:

> We do not accept Bell Atlantic's argument that basic services used with interstate enhanced services are not subject to interstate tariffing under Title II of the Act. Bell Atlantic seems to reason that because enhanced services are not common carrier services under Title II, the basic services that underlie enhanced services are somehow also not subject to Title II. We do not agree. Enhanced services by definition are services "offered over common carrier transmission facilities." *Since the Computer II regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.*

Filing and Review of Open Network Architecture Plans, 4 F.C.C.R. 1, 141, para. 274 (1988) (footnotes omitted) (emphasis added).[7]

[7] The reference to "*Computer II*" is to the Commission's proceeding styled *Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384 (1980). In *Computer II*, the FCC addressed precisely the question presented here, that is, the proper regulation of information services and the transmission services over which those information services are offered. At the time, the FCC used the term "enhanced services" for what the Act today calls "information services," and it used "basic services" for what the Act today calls "telecommunications services." The Commission has held that Congress

After the passage of the 1996 Act, the FCC reaffirmed, in the context of broadband Internet access service offered over DSL lines, that the fact that the end user receives a bundled offering does not change the fact that the transmission involved is a telecommunications service:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24,012, 24,030, para. 36 (1998).

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adopted the *Computer II* framework in adopting the definitions here at issue:

> The 1996 Act added or modified several of the definitions found in the Communications Act of 1934, including those that apply to "telecommunications," "telecommunications service," "telecommunications carrier," "information service," "telephone exchange service," and "local exchange carrier." In section 623(b)(1) of the Appropriations Act, Congress directed us to review the Commission's interpretation of these definitions, and to explain how those interpretations are consistent with the plain language of the 1996 Act. Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. *Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" to parallel the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.*

Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11,501, 11,511, para. 21 (1998) (emphasis added).

The courts have joined the Commission in rejecting the concept that bundling information services with telecommunications services changes the statutory classification of the latter. The consent decree that broke up the Bell System prohibited the Bell Operating Companies ("BOCs") from providing "interexchange telecommunications services." *U.S. v. AT&T*, 552 F. Supp. 131, 227 (D.D.C. 1982). The BOCs later argued in the context of such services that were bundled with an information service "that so long as the interexchange portion of the service is not separately identified to the customers and not separately charged to the customer, it is not offered for hire even though it is bundled in the overall gateway service, which is clearly offered for hire." *U.S. v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990). The court rejected the argument:

> We think appellants urge a rather strained interpretation of the language of the decree. Under their view, interexchange service, no matter how extensive, could be provided by the BOCs by simply packaging that service with some other noninterexchange telecommunications or even nontelecommunications service. That interpretation, it seems rather obvious, would create an enormous loophole in the core restriction of the decree. To be sure, information services, of which the gateway proposal appears to be a variant, may well shortly be removed from the decree's coverage. Nevertheless, when information services are, as here, bundled with leased interexchange lines, the activity is covered by the decree.

Id. (internal citation omitted).

The D.C. Circuit's treatment of the bundling issue is especially relevant here because the definition of "information service" in the consent decree is in all material respects identical to (and in fact served as the basis for) the definition

of that term as added to the Communications Act in 1996.[8] It is reasonable to assume that Congress was aware of the judicial constructions that had been placed on the term "information service" as it was used in the consent decree. *See Garrett v. U.S.*, 471 U.S. 773, 793 (1985) ("Congress is predominantly a lawyer's body . . . and it is appropriate for us to assume our elected representatives . . . know the law.") (citations omitted).

B. The FCC's Distinction Between "Offering" and "Using" Telecommunications Defies Common Sense and Has No Legal Significance.

The Commission's second argument, that cable companies "use" rather than "offer" telecommunications to their subscribers, *see* FCC Pet. at 16, is entirely dependent on, and in fact is merely a restatement of, the argument that bundling a telecommunications service with an information service changes the statutory classification of the telecommunications service. The Commission itself makes it clear that it views its "use" argument as simply the logical conclusion of its bundling argument: "*Focusing on the 'single, integrated information service* that the subscriber to cable modem service receives,' the Commission concluded that the cable operator 'is not offering telecommunications services to the end user, but rather is merely using telecommunications to provide end

[8] Under the consent decree:

> "Information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information which may be conveyed via telecommunications, except that such service does not include the use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

U.S. v. AT&T, 552 F. Supp. 131, 229 (D.D.C. 1982); *see also* H.R. REP. NO. 104-458 at 115-16 (1995), *reprinted in* 1996 U.S.C.C.A.N. 126-27.

users with cable modem service.'" FCC Pet. at 19 (emphasis added).

Even if the "use" argument could somehow stand on its own, it is nonsensical. It requires no technical expertise to recognize that the reason that consumers are willing to pay more for cable modem service than for dial-up or even DSL service is that the transmission speeds are faster. *See* NCTA Pet. at 4 (cable modem "speeds more than twenty times faster than dial-up"). The very basis of the bargain between the cable modem customer and the cable modem provider is that the customer pays a premium for faster transmission.

Under these circumstances, it defies common sense and the ordinary meaning of the words involved to say that the cable company is not "offering" the transmission to the customer. Indeed, if the cable company is not offering the transmission, from whom does the customer obtain the transmission that he is using and, most relevant under the definition of "telecommunications service," for which he has paid? As Judge Thomas said in his concurrence in *Brand X*, "[u]nder the FCC's approach, the general public would be purchasing a service that nobody offered." FCC Pet. App. at 31a.

The "use" versus "offer" distinction also conflicts with the statute in a more technical respect. "Telecommunications" does not include all transmission, only "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). Thus, it matters whose information is being sent, and who directs the sending.

When an Internet subscriber participates in an on-line auction, posts a message to an electronic bulletin board, or sends an email, it is that subscriber, and nobody else, who determines what information is sent, and where. The Commission below agreed with EarthLink that this is the case,

stating that: "As EarthLink comments, the majority of the information accessed over the Internet is chosen individually by the Internet user without the involvement of the cable operator. . . ." FCC Pet. App. at 129a. The fact that the end user controls the information flow during use of an information service is the reason the definition of information service speaks in terms of capabilities provided via "telecommunications" as opposed to via the much broader "communication by wire or radio" found in Section 2 of the Act. *See* 47 U.S.C. § 152.

If the FCC were correct that it is the cable company that is "using" the transmission associated with its cable modem service, that transmission would not be "telecommunications" under the Act, because the cable company does not choose what information is sent, or where that information goes. Under the FCC's reading, cable modem service would cease to include an "information service" (the one part of the classification that the parties agree upon), because it would no longer be provided "via telecommunications," but instead would involve transmission that did not meet the "telecommunications" definition.[9] Thus, the Commission's interpretation, which is based on avoidance of the plain two-part test in the definition of "telecommunications service" and the addition of the qualifier "stand-alone" to that definition, fails both a plain language reading of the statute and also a more technical parsing of the relevant definitions.

[9] The information control component of the term "telecommunications" also addresses Verizon's suggestion that Congress' inclusion of the definition of "telecommunications" is superfluous under *Brand X*. *See* Verizon Brief at 24-25.

II. THIS CASE DOES NOT IMPLICATE ANY CIRCUIT CONFLICT THAT MAY EXIST REGARDING THE RELATIONSHIP BETWEEN *CHEVRON* AND STARE DECISIS.

The FCC's second argument consists of a tepid suggestion that *Brand X* exacerbates an existing conflict among the circuits regarding the relationship of prior three-judge panel decisions and later-enacted agency rules that conflict with those decisions. FCC Pet. at 19-20. This case presents no such conflict. Whereas the *Brand X / Portland* rulings were based upon the clear meaning of the statute,[10] the case most relied on by the Commission, *Satellite Broadcasting & Communications Association of America v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994), held that the Eleventh Circuit's earlier decision was not based "upon the statute's 'clear meaning,' but rather upon inferences drawn from the statutory scheme and upon our policy determination . . . ."[11] Thus, the case relied on by the FCC as being in conflict with the rule in the Ninth Circuit deals with the statutory interpretation issue presented in a *Chevron* step two analysis, that is, where there is an ambiguity to be resolved by the agency. In contrast, the Ninth Circuit's decision in *Portland* was based upon a plain meaning analysis that was equivalent

[10] The *Brand X* per curiam decision stated that "while we never explicitly stated in *Portland* that our interpretation was the only one possible, we never said the relevant provisions of the Act were ambiguous." FCC Pet. App. at 19a. In his concurrence, Judge Thomas went further, stating that "the statutory definitions, combined with the overall regulatory and legislative context, compel the result that cable modem service includes a telecommunications service component." *Id.* at 39a.

[11] The Eleventh Circuit in *Satellite Broadcasting* made it clear with respect to its prior precedent, *NBC v. Satellite Broacast Networks*, 940 F.2d 1467 (11th Cir. 1991) ("SBN"), that "[b]ecause we did not address the 'clear meaning' of § 111(f) in SBN, this circuit is not precluded from revisiting our initial interpretation of the regulatory scheme in SBN." *Satellite Broadcasting*, 17 F.3d at 348.

to a *Chevron* step-one analysis. The *Brand X* outcome, therefore, is entirely consistent with the Eleventh Circuit's indication that a precedent based on the clear meaning of the statute would be preserved.

In addition to the fact that this case presents no conflict, petitioners ignore the ability of an en banc court to overrule prior precedent as may be necessary to avoid any unintended or inappropriate results from the application of the general rule that one three-judge panel may not overrule another. Here, of course, other than one panel member's vote in favor of the suggestions for rehearing en banc, no active member of the Ninth Circuit requested a vote on those petitions. FCC Pet. App. at 206a-207a.

The FCC's assertion that *Neal v. United States*, 516 U.S. 284 (1996), does not support the appeals court's conclusion is both irrelevant and incorrect. The *Brand X* panel relied first and foremost on the Ninth Circuit's en banc decision in *Mesa Verde Construction Co. v. Northern California District Council of Laborers*, 861 F.2d 601 (9th Cir. 1988). *See* FCC Pet. App. at 19a ("*Mesa Verde's* requirements are not met in this instance and *Portland's* construction of the Communications Act remains binding precedent within this circuit"). The panel then indicated that "[w]e find further support for this conclusion in the Supreme Court's holding in *Neal v. United States*. . . ." *Id.* *Neal* was thus merely an alternative or supporting basis for the *Brand X* decision. In any case, because the Ninth Circuit did not view the statute as ambiguous either time that it addressed it, the relationship between *Neal* and *Chevron* step two is not implicated by either *Portland* or *Brand X*. The Commission urges that "*Neal* is thus best viewed as addressing a statute with a clear and unambiguous meaning . . . ." FCC Pet. at 22. That is this case.

III. THE FCC'S POLICY ARGUMENTS IN FAVOR OF GRANTING THE PETITIONS MISSTATE THE IMPACT OF THE DECISION BELOW AND CONFLICT WITH THE ACT AND THE COMMISSION'S OWN RULINGS.

The FCC urges that Section 706 of the Telecommunications Act of 1996 somehow compels it, in order to encourage broadband deployment, to refuse to acknowledge that broadband transmission can be a common carrier service. Setting aside that broadband is, by the Commission's own estimation, already deployed in all but the most rural parts of the country, *see Availability of Advanced Telecomms. Capacity in the United States,* FCC 04-208, Fourth Report to Congress at 30 (Sept. 9, 2004), the Commission itself has held that Section 706[12] does not constitute a grant of independent regulatory authority:

> After reviewing the language of section 706(a), its legislative history, the broader statutory scheme, and Congress' policy objectives, we agree with numerous commenters that section 706 does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods. Rather, we conclude that section 706(a) directs the Commission to use the authority granted in other provisions, including the forbearance authority under section 10(a),[13] to encourage deployment of advanced services.

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[12] The full text of Section 706 is set forth in the appendix to this brief at 10a-11a.

[13] It is significant that the Commission has itself held that Section 706 directs the use of Section 10 forbearance to fulfill its objectives, because Section 10 only authorizes the Commission to forbear from applying regulations and provisions of the Act as they apply to telecommunications carriers and telecommunications services. If cable modem service providers are not telecommunications carriers, then Section 10, and by extension Section 706, does not apply. Moreover, Section 706(a) begins with an exhortation to "[t]he Commission and each State commission with

Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24,012, 24,044, para. 69 (1998) (footnote added).

The FCC also selectively quotes Section 230 of the Communications Act, 47 U.S.C. § 230, for the proposition that everything associated with the Internet should be "unfettered by Federal and State regulation." FCC Pet. at 24. The Commission sets forth what it calls the "pertinent parts" of the text of Section 230 in its appendix. FCC Pet. App. at 210a. An examination of the full text of the section, EarthLink Opp. App. at 5a-9a, reveals that Section 230 has nothing to do with whether a given transmission service is a telecommunications service, but instead deals with liability for transmitting the speech of others and with protections for service providers that offer technologies for blocking obscene or harassing material.

The FCC also suggests that the Ninth Circuit's decision would subject cable modem service providers to common carrier regulation with respect to the information service component of cable modem service. *See* FCC Pet. at 24-25 ("Unlike telecommunications and cable service providers, which are subject to extensive regulatory obligations under the Communications Act, information service providers operate in a largely unregulated environment . . . ."). To the extent that the FCC is suggesting that the entire cable modem service would be classified as a telecommunications service, that is clearly incorrect. The holding in *Portland* and *Brand X* was that only the transmission component of the service is a telecommunications service. The computer services that ride over that transmission service would remain classified as information services and would thus be unregulated.

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regulatory authority over *telecommunications services* . . . ." 47 U.S.C. § 157 nt (emphasis added).

The FCC argues that allowing the Ninth Circuit's decision to stand would prevent the Commission from "developing a 'rational framework for regulation of competing services' that is 'consistent across multiple platforms.'" FCC Pet. at 27, quoting FCC Pet. App. at 48a. To the contrary, *overturning* that decision would leave the Commission essentially powerless to regulate the transmission over which mass-market Internet access services are offered. This is the case because the Act states that a telecommunications carrier shall be treated as a common carrier "*only* to the extent that it is engaged in providing telecommunications services . . . ." 47 U.S.C. § 153(44) (emphasis added).

It is one thing for the Commission to remove regulation through the mechanism set by Congress, Section 10 of the Act. It is quite another for the Commission to interpret the statute so as to strip the Commission of all power to enforce common carrier obligations with respect to a set of services that are poised to replace the existing communications system. Acceptance of *that* result, and not the result reached by the court of appeals, would "stop[] a vitally important policy debate in its tracks . . . ." FCC Pet. App. at 23a, quoting *Brand X* (O'Scannlain, J., concurring). That this would be the result of accepting the FCC's position demonstrates that the Commission's reading of the statute would be unreasonable even in the event that *Chevron* step two were the proper standard of review, which it is not.

The Commission's final argument is that its forbearance authority under Section 10 of the Act, 47 U.S.C. § 160, is an inadequate tool to remove any unnecessary regulations, largely because such proceedings would be "time-consuming and hotly contested . . . ." FCC Pet. at 28. The Commission's broad Section 10 authority was put in place by Congress to allow the Commission to relieve from common carrier regulation any "telecommunications carrier or telecommunications service, or class of telecommunications carriers or

telecommunications services," should the service or carrier meet the test established by Congress. 47 U.S.C. § 160(a). Both the courts and the Commission are not only bound by Congress' purpose, but also by the "means it has deemed appropriate, and prescribed, for the pursuit of those purposes." *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231 n.4 (1994). If the FCC finds its Section 10 authority unwieldy, that is an issue for Congress, not for this Court.

CONCLUSION

The FCC's reading of the statute ignores the simple two-part test that determines when "telecommunications" becomes "telecommunications service." That reading would allow common carriers to escape regulation simply by combining transmission services with information services, and it would effectively remove the agency from the regulatory landscape with respect to what is rapidly becoming the most ubiquitous and popular form of telecommunications in history. That reading of the statute is impermissible under any standard of review, and the Ninth Circuit was correct in saying so. There is no issue here that warrants this Court's intervention, and the petitions should be denied.

Respectfully submitted,

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APPENDICES

APPENDIX A

STATUTORY APPENDIX

1. Section 3 of the Communications Act [47 U.S.C. 153] provides in pertinent part:

Definitions.

For the purposes of this Act, unless the context otherwise requires—

* * * *

(20) Information Service.

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

* * * *

(43) Telecommunications.

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications Carrier.

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether

the provision of fixed and mobile satellite service shall be treated as common carriage.

* * * *

(46) Telecommunications Service.

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

* * * *

2. Section 10 of the Communications Act [47 U.S.C. 160] provides:

Competition in Provision of Telecommunications Service.

(a) Regulatory Flexibility.

Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive Effect to be Weighed.

In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for Forbearance.

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation.

Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State Enforcement After Commission Forbearance.

A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

3. Section 201 of the Communications Act [47 U.S.C. 201] provides:

Service and Charges.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided*, That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government, and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for the different classes of communications: *Provided further*, That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any

other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

4. Section 230 of the Communications Act [47 U.S.C. 230] provides:

Protection for Private Blocking and Screening of Offensive Material.

(a) Findings.

The Congress finds the following:

(1) The rapidly developing array of Internet and other interactive computer services available to individual Americans represent an extraordinary advance in the availability of educational and informational resources to our citizens.

(2) These services offer users a great degree of control over the information that they receive, as well as the potential for even greater control in the future as technology develops.

(3) The Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.

(4) The Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.

(5) Increasingly Americans are relying on interactive media for a variety of political, educational, cultural, and entertainment services.

(b) Policy.

It is the policy of the United States—

(1) to promote the continued development of the Internet and other interactive computer services and other interactive media;

(2) to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation;

(3) to encourage the development of technologies which maximize user control over what information is received by individuals, families, and schools who use the Internet and other interactive computer services;

(4) to remove disincentives for the development and utilization of blocking and filtering technologies that empower parents to restrict their children's access to objectionable or inappropriate online material; and

(5) to ensure vigorous enforcement of Federal criminal laws to deter and punish trafficking in obscenity, stalking, and harassment by means of computer.

(c) Protection for "Good Samaritan" Blocking and Screening of Offensive Material.

(1) Treatment of Publisher or Speaker.

No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.

(2) Civil Liability.

No provider or user of an interactive computer service shall be held liable on account of—

(A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected; or

(B) any action taken to enable or make available to information content providers or others the technical means to restrict access to material described in paragraph (1).[1]

(d) Obligations of Interactive Computer Service.

A provider of interactive computer service shall, at the time of entering an agreement with a customer for the provision of interactive computer service and in a manner deemed appropriate by the provider, notify such customer that parental control protections (such as computer hardware, software, or filtering services) are commercially available that may assist the customer in limiting access to material that is harmful to minors. Such notice shall identify, or provide the customer with access to information identifying, current providers of such protections.

(e) Effect on Other Laws.

(1) No Effect on Criminal Law.

Nothing in this section shall be construed to impair the enforcement of section 223 or 231 of this Act, chapter 71 (relating to obscenity) or 110 (relating to sexual exploitation of children) of title 18, United States Code, or any other Federal criminal statute.

---

[1] So in law. Probably should be subparagraph (A).

(2) No Effect on Intellectual Property Law.

Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.

(3) State Law.

Nothing in this section shall be construed to prevent any State from enforcing any State law that is consistent with this section. No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.

(4) No Effect on Communications Privacy Law.

Nothing in this section shall be construed to limit the application of the Electronic Communications Privacy Act of 1986 or any of the amendments made by such Act, or any similar State law.

(f) Definitions.

As used in this section:

(1) Internet.

The term "Internet" means the international computer network of both Federal and non-Federal interoperable packet switched data networks.

(2) Interactive Computer Service.

The term "interactive computer service" means any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions.

(3) Information Content Provider.

The term "information content provider" means any person or entity that is responsible, in whole or in part,

for the creation or development of information provided through the Internet or any other interactive computer service.

(4) Access Software Provider.

The term "access software provider" means a provider of software (including client or server software), or enabling tools that do any one or more of the following:

(A) filter, screen, allow, or disallow content;

(B) pick, choose, analyze, or digest content; or

(C) transmit, receive, display, forward, cache, search, subset, organize, reorganize, or translate content.

5. Section 102 of the Communications Assistance for Law Enforcement Act [47 U.S.C. 1001] provides in pertinent part:

Definitions.

For purposes of this title—

* * * *

(6) The term "information services"—

(A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and

(B) includes—

(i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(ii) electronic publishing; and

(iii) electronic messaging services; but

(C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

* * * *

6. Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153 [Reproduced at 47 U.S.C. 157 nt] provides:

Advanced Telecommunications Incentives.

(a) In General.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act (Feb. 8, 1996), and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Definitions.—For purposes of this subsection:

(1) Advanced Telecommunications Capability.—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and Secondary Schools.—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

APPENDIX B

MISCELLANEOUS APPENDIX

U.S. Department of Justice

Federal Bureau of Investigation

CALEA Implementation Unit
14800 Conference Center Drive, Suite 300
Chantilly, Virginia 20151

December 8, 2003

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notice of *Ex Parte* Presentation
(CC Docket Nos. 02-33, 95-20 and 98-10; CS Docket No. 02-52; WC Dockets 02-361, 03-45 and 03-211)

Dear Ms. Dortch:

Pursuant to Section 1.1206(b) of the Commission's Rules, 47 C.F.R. § 1.1206(b), the United States Department of Justice ("DOJ") components, namely, the Office of the Solicitor General ("OSG"), the Federal Bureau of Investigation ("FBI"), and the Drug Enforcement Administration ("DEA") (collectively, "Law Enforcement"), hereby submit notice of an *ex parte* meeting on December 5, 2003.

The following DOJ personnel attended the meeting:

- John G. Malcolm, Deputy Assistant Attorney General, DOJ Criminal Division
- Scott McIntosh, DOJ Civil Appellate Division

- Lena Watkins, DOJ Narcotics and Dangerous Drugs Section
- Thomas G. Hungar, Deputy Solicitor General, OSG
- Patrick W. Kelley, Deputy General Counsel, FBI Office of General Counsel
- Jon Pifer, FBI Office of General Counsel
- Merrill (Wes) Clark, Senior Attorney, DEA Office of Chief Counsel
- Joel M. Margolis, consultant, FBI CALEA Implementation Unit

The Commission staff members who attended the meeting were Julius Knapp of the Office of Engineering and Technology, and Susan Aaron and Christopher Killion of the Office of the General Counsel.

The purpose of the meeting was to discuss the Communications Assistance for Law Enforcement Act ("CALEA"), 47 C.F.R. § 1001 *et seq.*, in the context of the above-referenced dockets.[1] In particular, Law Enforcement pre-

[1] *See In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, 17 FCC Rcd 3019 (2002); *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) ("*Cable Modem Declaratory Ruling*"); *In the Matter of AT&T Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361 (filed Oct. 18, 2002); *In the Matter of Petition for Declaratory Ruling That Pulver. com's Free World Dialup Is Neither Telecommunications Service* [sic] *Nor A Telecommunications Service*, WC Docket No. 03-45 (filed Feb. 5, 2003); *In the Matter of Vonage Holdings Corporation Petition for Declaratory*

sented various legal theories under which the Commission could apply CALEA to Internet access service.

Law Enforcement advanced the theory that Internet access service is a "telecommunications service," or at least contains a "telecommunications service" that implicates the CALEA statute. CALEA could cover Internet access, Law Enforcement reasoned, without triggering the full burden of other regulatory mandates promulgated under Title II of the Communications Act of 1934, as amended ("Title II") because the Commission could streamline those burdens using several regulatory tools, including forbearance, rule waivers, extensions of time, and self-certifications of compliance.

Although cable operators are generally not subject to Title II, Law Enforcement remarked that CALEA already applies expressly to cable operators, as well as electric utilities and other utilities, to the extent those entities engage in telecommunications services. Law Enforcement also stated its belief that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA. Moreover, Law Enforcement explained that CALEA's importance to national security warrants special treatment of the statute in the Commission's pending broadband Internet access proceedings.

Law Enforcement also contended that Internet access providers fit the unique definition of "telecommunications carrier" set forth at CALEA Section 102(8). Specifically, it argued that Internet access service is a substantial replacement for local exchange service pursuant to CALEA Section 102(8)(B) because both services perform a common set of functions and differ only in the technical form of their respective "pipes." Law Enforcement explained that

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Ruling Concerning an Order of the Minnesota Public Utilities Commission, WC Docket No. 03-211 (filed Sept. 22, 2003).

CALEA's legislative intent was to classify Internet access providers as entities covered by CALEA, not information service providers exempt from CALEA, because Internet access provides the transport to information services and is not an information service by itself.

Alternatively, Law Enforcement suggested that CALEA could attach to Internet access providers by virtue of the "telecommunications" component of Internet access that the Commission believes exists even if Internet access is classified as an information service. This theory would apply under CALEA Section 102(8)(A) or 102(8)(B), it said, without obstructing the Commission's desired classification scheme.

Law Enforcement clarified that while it could settle for any of the theories of CALEA coverage outlined above, it would reserve the right to promote whichever theory is best suited to succeed in court and oppose any Commission analysis that predetermines an unfavorable treatment of CALEA. Law Enforcement emphasized that its efforts are directed toward ensuring that Internet access providers are subject to CALEA, and not toward imposing all other Title II mandates on such providers.

Respectfully submitted,

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Nos. 04-277 & 04-281

Supreme Court, U.S.
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In The
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, et al.,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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September 30, 2004

QUESTION PRESENTED

Whether the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, compels the conclusion that cable modem service contains a telecommunications service component within the meaning of § 153(46), as the Ninth Circuit held.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents States and Consumer Groups state the following:

The California Public Utilities Commission, the Vermont Public Service Board, and the Vermont Department of Public Service (States) are governmental entities.

The Consumer Federation of America (CFA) and Consumers Union (CU) (Consumer Groups) do not issue shares to the public and have no parent corporations that issue shares to the public. The Consumer Federation of America is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

Consumers Union, publishers of *Consumer Reports*, is an independent, nonprofit testing and information organization serving only consumers.

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Vermont Telecommunications Plan, September 2004, Vermont Department of Public Service 3

BRIEF FOR THE STATES AND CONSUMER GROUPS IN OPPOSITION

The People of the State of California and the California Public Utilities Commission, the State of Vermont, the Vermont Public Service Board and the Vermont Department of Public Service, the Consumer Federation of America, and Consumers Union, respectfully oppose the petitions for a writ of certiorari.

PRELIMINARY STATEMENT

This case raises no significant legal question that warrants the Court's review. In *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit correctly held, after a straightforward statutory analysis that courts of appeals routinely perform, that the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (Act or 1996 Act), compels the conclusion that cable modem service includes a common carrier telecommunications service component within the meaning of § 153(46) of the Act.[1] The decision below properly adhered to that precedent. This construction is the only reasonable interpretation of the Act that comports with the statute as a whole. It is also the only one consistent with the Act's twin goals of promoting competition and ensuring that all Americans have affordable access to the high-speed conduits necessary to receive the wide variety of advanced telecommunications and information services that competitors offer.

[1] Relevant provisions are set forth in the attached Statutory Appendix. "Pet. App." refers to the FCC's Appendix accompanying its petition.

There is no substance to the FCC's claim that the Ninth Circuit improperly "settled" "a vastly important aspect of national telecommunications policy." FCC Pet. at 3. The FCC's claim conflates the question of how Congress classified cable modem service under the Act – the issue properly before the Ninth Circuit and this Court – with the question of whether cable modem service should be regulated under the Act – an issue not decided by the Ninth Circuit, and not before this Court either. Far from having "overridden" the FCC, or having otherwise "directly threaten[ed]" or "settled" the national policy of whether cable modem service should be regulated, the Ninth Circuit expressly stated that it was for the FCC to make that call. The court did not at all impinge on the FCC's ability to do so. Instead, the court made clear that under § 160 the FCC could refrain from regulating cable modem service altogether – exactly what the FCC seeks – but only by the means that Congress prescribed. *Portland*, 216 F.3d at 879-80.

Nor is there substance to the FCC's claim that the statute is ambiguous, thus requiring deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), to its classification of cable modem service under the Act. But even if the FCC's claim were correct, the FCC would not deserve *Chevron* deference because its interpretation of the Act is simply not reasonable. Its classification of cable modem service as solely an information service not only lacks textual support in the Act, but it renders inapplicable the very provisions of the Act that promote competitive access by any Internet service provider (ISP), and universal access by all Americans, to the high-speed services that connect customers to the Internet.

In practice, the FCC's construction would have enormously adverse consequences for consumers. In California, only one in four customers who have access to high-speed transmission service to connect to an ISP has a choice between digital subscriber line (DSL) service and cable modem service.[2] In Vermont, nearly half of its population with access to broadband service has only one choice – either DSL or cable modem service.[3] For the millions of customers whose only option is cable modem service, the FCC would be powerless to require the same common carrier obligations applicable to DSL service that ensure affordable access to the ISP of the customer's choice. The customers will thus see fewer service choices, enjoy little or no protection against unreasonable rates for accessing an ISP, and if they are disabled or poor, have no guarantee that they will even be able to access the Internet.

In short, the Ninth Circuit's decision is not problematic and raises no significant issues. Further review is not warranted.

STATEMENT OF THE CASE

1. Access to the Internet. The Internet is a collection of computers that store and process information, connected by a network. Internet service providers, as the name suggests, provide access to that network to ordinary

[2] *The Status of Telecommunications Competition in California*, Second Report for the Year 2002, at 32, California Public Utilities Commission.

[3] *Vermont Telecommunications Plan*, September 2004, at 3-10, Vermont Department of Public Service.

consumers, typically also providing consumers with other services, such as an e-mail account. Consumers, in turn, need to have some way of contacting, or connecting to, the ISPs. Hence, the service that ISPs provide generally has two components: an information service component (connecting and processing information to and from the Internet), and a telecommunications component that gives consumers access to the ISP's services.

Initially, ISPs usually were stand-alone enterprises, and customers accessed them via their ordinary, regulated dial-up telephone service provided by the telephone company, separate from the ISP. Although the network that connects all computers that comprise the Internet is relatively high-speed, ordinary telephone service connecting end-use customers to the ISP is very slow, and thus creates a speed bottleneck. Accordingly, as technologies developed, telephone companies introduced a new, faster technology, known as digital subscriber line service, to allow end-users to connect to ISPs. With the advent of DSL service, some telephone companies created their own ISPs, and bundled sales of their DSL service with their ISP services. Later still, cable television operators entered the broadband (*i.e.*, high-speed) market, creating their own ISPs, and used their cable lines, which are functionally similar to DSL lines, to allow users to have a relatively fast connection to ISP services. Today, the "last-mile" high-speed connection which enables a customer to access an ISP is principally controlled either by the telephone company via DSL service or by the cable company via cable modem service.[4] Cable modem service, however,

[4] As the FCC notes, other types of broadband networks are not yet available to residential customers. FCC Pet. at 5.

comprises nearly two-thirds of the broadband market. *See* Industry Analysis & Technology Div., FCC, *High-Speed Services for Internet Access: Status as of December 31, 2003*, at 8, Table 3 (June 2004).

Until the ruling below, the FCC "consistently recognized that Internet access implied the separate provision of a telecommunications service by some entity," even if to itself. Pet. App. 31a (Thomas, J., concurring) (citing *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,539-40 (1998) (*Universal Service Report*), & *In re Bell Operating Cos. Joint Petition for Waiver of Computer II Rules*, 10 F.C.C.R. 13,758, 13,767-68 (1995). The FCC further acknowledged that from the customer's perspective, Internet access might look like one service, but under the Act, the FCC classified the two services separately: "the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access." Pet. App. 32a (Thomas, J., concurring) (quoting *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,030, ¶ 36 (1998)). The FCC thus classified the DSL transmission component of Internet access as a common carrier "telecommunications service." *Id.* at ¶ 37.

In the ruling below, however, the FCC classified functionally similar cable modem service as solely an information service with no separate telecommunications service component.[5] Thus, unlike most dial-up and many DSL ISPs, "cable-owned or cable-affiliated ISPs ... essentially

[5] The FCC defines cable modem service to include both the high-speed access to the Internet as well as the applications or functions that can be used with high-speed access. Pet. App. 86a.

own the 'last mile' (*i.e.*, the connection between the headend and the subscriber's home), giving them the power to restrict other ISPs' access to cable subscribers." Pet. App. 5a. Although a cable modem subscriber may bypass the cable ISP's services and "click through" to another ISP, the subscriber is compelled to "pay a monthly 'fee' 'directly' to the cable company in order to use "'telecommunications'" to reach another ISP. *Id.* at 30a-31a (Thomas, J., concurring).

2. The 1996 Act. In recognition of new and evolving transmission technologies to connect customers to new and innovative information services available on the Internet, Congress enacted the 1996 Act "to open all telecommunications markets to competition," Preamble, 110 Stat. 56, including those served by ISPs, so that all Americans could have access to a wide variety of services from numerous providers. To that end, the statute maintained the regulatory requirement that "telecommunications" transmission services continue to be offered on just, reasonable, and nondiscriminatory terms. "Information services" were left largely unregulated.

The Act's distinction between "telecommunications services" and "information services" derives from the distinction between "basic services" and "enhanced services" under what is known as the "Computer II"[6] regulatory framework. *See Universal Service Report*, 13 F.C.C.R. at

[6] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Computer II)*, Final Decision, 77 F.C.C. 2d 384, 417 (1980), *recon.* 84 F.C.C. 2d 50 (1980), *further recon.*, 88 F.C.C. 2d 512 (1981), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982), *cert. denied*, 461 U.S. 938 (1983).

11,511-14, ¶¶ 21-27. Since 1980, the FCC has fostered vigorous competition in information service markets by mandating a network architecture that gives information service providers nondiscriminatory and reasonable access to basic network transmission services controlled by telecommunications providers. Under this framework, the FCC distinguished between "basic" transmission services and "enhanced" services, like LEXIS, provided over them, regulating the former but not the latter. The FCC required companies that publicly offered basic transmission and enhanced services together to unbundle the transmission service they controlled and offer it on nondiscriminatory terms to competitive providers of enhanced services in accordance with §§ 201 and 202 of Title II. Pet. App. 35a (Thomas, J., concurring).[7]

Computer II's regulatory framework spawned an explosive growth of new and innovative information services introduced by a multitude of new competitive entrants into the information services market. *Universal Service Report*, 13 F.C.C.R. at 11,546, ¶ 95. Telephone companies in turn began to develop and perfect high-speed DSL transmission services to support the delivery to customers of Internet-based information services offered by both the telephone company and competitive ISPs. The ultimate beneficiaries of this regulatory framework have been consumers, with greater access to a wider variety of information services from numerous providers at lower prices.

[7] The FCC treats companies that merely lease transmission facilities from telephone companies as offering enhanced services only. Pet. App. 39a (Thomas, J., concurring) (citation omitted).

In the 1996 Act, Congress not only maintained the Computer II framework, but expanded upon it by requiring additional network unbundling to increase competitive access to the basic transmission facilities and services of all telecommunications providers. § 251; Pet. App. 35a-36a (Thomas, J., citing *Universal Service Report*, 13 F.C.C.R. at 11,511, ¶ 21) (Act built upon Computer II framework and its definitions). With respect to advanced telecommunications services, in sections 706(a) and 706(c)(1) Congress encouraged both the FCC and the states to continue to use their regulatory tools to spur telecommunications providers to extend transmission services "without regard to any transmission media or technology" to high-cost areas, to low-income and disabled customers, and to schools and libraries, so that all Americans would enjoy access to a wide choice of competitive advanced information services at lower prices. § 254(b)(2), (3), (6); § 255.

In § 160, Congress gave the FCC the additional tool of regulatory forbearance to enable the agency to refrain from regulating services that otherwise fall within its regulatory authority – like the telecommunications service portion of cable modem service – provided specified conditions to ensure consumer protection are satisfied.

Under the Act's framework, the FCC limited its regulation to those companies that provide the underlying transmission service for information services. *See Universal Service Report*, 13 F.C.C.R. at 11,546, ¶ 95. In particular, the FCC required telephone companies that offer DSL transmission integrated with their Internet-based information services to unbundle and offer to competing ISPs nondiscriminatory access on reasonable terms to this "last-mile" connection to their subscribers. *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. at 24,030, ¶ 37 (*Advanced Services Order*).

Until the ruling at issue here, the FCC's regulation cohered perfectly with the Act's definitions of "telecommunications," "telecommunications service," and "information service." In § 153(46), a "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Under § 153(43), "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." "Information services" are defined under § 153(20) of the Act in pertinent part as services that offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Congress specified in § 153(44), which defines "telecommunications carrier," that a provider offering telecommunications services shall be treated as a common carrier, but "only to the extent that it is engaged in providing teleccmmunications services." Thus, to the extent that a company provides integrated DSL and ISP services over its own facilities, the FCC regulates only the DSL (transmission) service.

The FCC has stated that the definitions of "telecommunications service" and "information service" are mutually exclusive, and no one disagrees. At the same time, the FCC has made plain that a "telecommunications service" does not lose its character as such when a company combines it with an information service. *Universal Service Report*, 13 F.C.C.R. at 11,530, ¶ 60.

The Act's definitions distinguish services on the basis of function, and not on the type of technology or facilities used to provide them. The definitions thus apply to all

telecommunications and information services regardless of whether broadband or narrowband or some other technology or medium is used, and regardless of whether cable, wireline, or wireless facilities are deployed to enable their provision. § 706(c)(1); § 153(46); H.R. Rep. No. 98-934, at 43, 1984 WL 37495 ("distinction between cable services and other services offered over cable systems is based upon the nature of the service provided, not the technological evaluation of the two-way transmission capabilities of cable systems").

3. *AT&T Corp. v. City of Portland.* Four years ago, consistent with the Act's language, structure, and purpose, as well as the FCC's existing regulatory regime, in *AT&T Corp. v. City of Portland*, the Ninth Circuit determined that Congress intended to classify high-speed access to the Internet via cable lines as a telecommunications transmission service. *Portland*, 216 F.3d at 877-79. The issue arose in a dispute over whether the Act gave the city of Portland authority to condition AT&T's transfer of its cable TV franchise on AT&T's provision to competing ISPs of "open" or nondiscriminatory access to its cable broadband transmission service for Internet access. Pet. App. 12a-13a. The city was concerned that "AT&T might shut out competing ISPs by restricting cable broadband access to its own proprietary ISP." *Id.* at 13a.

"No less than six times in recent years," and at least two years before *Portland*, the question of how Congress intended to classify cable modem service under the Act was before the FCC, but each time the FCC declined to answer it. *Nat'l Cable & Telecomm. Ass'n, Inc. v. Gulf Power Co.*, 534 U.S. 327, 357 (2002) (Thomas, J., dissenting). The FCC participated as amicus curiae in *Portland*, but again would not address the issue. Pet. App. 18a-19a

("In *Portland*, we took pains to 'note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us.' ")

The answer to the purely statutory question required the court, undertaking a *Chevron* step-one type analysis, to determine independently how cable modem service is classified under the Act. *Portland*, 216 F.3d at 877-79. The court determined that cable modem service did not fit the definition of "cable service." *Id.* at 876-77. However, that determination was not sufficient to address whether the city nevertheless could impose an open access requirement pursuant to § 541(b)(3), which fences off from the city's reach a cable operator's provision of "telecommunications services." Pet. App. 13a. The court thus found it necessary to determine whether the transmission service component of cable modem service is a "telecommunications service." Pet. App. 13a, 16a-17a. The court closely examined the Act's definitions, and how they "cohere[d] with the [Act's] overall structure," history and purpose. *Portland*, 216 F.3d at 877-79. Reading the Act as a whole, the court concluded that cable modem service is in part a telecommunications service. The court said:

> Like other ISPs, [AT&T's cable broadband service] consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, [the cable broadband provider] controls all of the transmission facilities between its subscribers and the Internet. To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband

> facility, it is providing telecommunications service as defined in the Communications Act.

Pet. App. 15a (brackets and parentheses in orig.).

Noting that Congress expressly intended the Act to be technologically neutral, the court also cited the FCC's regulation of DSL service, "a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations." *Portland*, 216 F.3d at 879. The FCC itself previously said:

> [Bell Operating Companies] offering information to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services.

Advanced Services Order, 13 F.C.C.R. at 24,030-31, ¶ 37.

The court further considered the Act's purpose in promoting "vigorous competition" among providers that "prioritizes consumer choice" by mandating a network architecture embodied by the "dual duties of nondiscrimination and interconnection." *Portland*, 216 F.3d at 879. It concluded that the principles of nondiscriminatory access in §§ 201 and 202 necessarily apply to all Internet transmission services. *Id.*

Based on this straightforward analysis, the Ninth Circuit unanimously concluded that the Act compels the conclusion that cable modem service contains a telecommunications service component. Having so concluded, the court held that the city's open access requirement was unlawful because the city sought to regulate telecommunications

services offered by cable operators in violation of § 541(b)(3). *Portland*, 216 F.3d at 880.

The court, however, did not conclude that the FCC was required to regulate the telecommunications service component of cable modem service under Title II. Recognizing the broad authority that Congress gave the FCC in § 160 to forbear from enforcing some or all of the Act's provisions, the court made clear that it was not "imping[ing]" on the FCC's authority over "the details of telecommunications policy," including its authority to forbear from regulating the service altogether. *Portland*, 216 F.3d at 879-80.

No party sought review of *Portland*, and the FCC has never challenged the correctness of that decision.

4. The FCC's Declaratory Ruling. Two years after *Portland*, the FCC finally weighed in on how to classify cable modem service under the Act. The FCC ruled, in agreement with *Portland*, that cable modem service is not a cable service under the Act. However, in direct conflict with *Portland*, and inconsistent with its regulation of DSL service, the FCC declared that cable modem service, when offered to the public for a fee, is solely an information service, and does not contain a telecommunications transmission service component subject to Title II and Computer II. Pet. App. 94a-96a.

Ignoring the fact that the Act requires technological neutrality, and relying on the historical happenstance of the way Internet access service had evolved, the FCC reasoned that Computer II's obligations of nondiscriminatory access to company-controlled transmission services "have been applied exclusively to traditional wireline services and facilities," that the "*telephone network* is the

primary, if not exclusive means" by which ISPs can access their customers, and that the FCC had "never . . . applied Computer II to information services provided over cable facilities." Pet. App. 100a-101a (emphasis in orig.) The FCC thus declared that only facilities-based (*i.e.*, those that own or control transmission facilities) *telephone* companies, but not facilities-based *cable* companies, must provide the transport underlying their information services on a common carrier basis. Pet. App. 101a-102a.

The FCC acknowledged that cable modem service does in fact contain a discrete telecommunications transmission component that is functionally separate from the information services component. Pet. App. 96a-97a. The FCC, however, contended that when a cable operator publicly offers cable modem service for a fee, the telecommunications transmission component ceases to be a legally separate service when bundled with information services. The FCC did not mention that it had repudiated that approach with respect to integrated services offered by telephone companies. *See Universal Service Report*, 13 F.C.C.R. at 11,530, ¶ 60. Instead, it asserted, without identifying any textual support in the statute, that the cable operator must offer its transmission service on a "stand-alone" basis to the end use customer in order for it to be considered a "telecommunications service" under the Act. Pet. App. 96a-97a. At the same time, the FCC admitted that the customer is not compelled to use the bundled services package, and could completely bypass the cable operator's ISP services by "clicking through" and separately utilizing the transmission path to reach another ISP if he paid an additional fee over and above the monthly charge for cable modem service, and thus paid twice for the service. Pet. App. 57a-58a.

The FCC further conceded that some cable operators do separately offer the telecommunications component of cable modem service to unaffiliated ISPs. Pet. App. 109a, 111a. The FCC, however, concluded that this offering is private carriage, and therefore not subject to regulation, although it admitted that "[t]he record does not contain sufficient facts" to support that conclusion. *Id.* at 111a. In the alternative, the FCC waived Computer II requirements otherwise applicable to the offering to avoid "an open access regime." Pet. App. 102a.

Commissioner Copps dissented from the ruling, stating that it was inconceivable "that Congress intended to remove from its statutory framework core communications services" such as cable modem service, or that Congress "envisioned its statutory handiwork being made obsolete by a new service offering." Pet. App. 199a. In particular he criticized the FCC's refusal "with scant analysis" to apply its own rules in Computer II that "ha[ve] been key to the development of a competitive information services market." Pet. App. 200a.

Simultaneous with the issuance of its ruling, the FCC initiated a further proceeding in which, among other things, it is considering whether to forbear under § 160 from regulating the telecommunications service component of cable modem service in light of *Portland's* holding. Pet. App. 151a-152a. The FCC has yet to act, notwithstanding that numerous parties submitted comments to the FCC over two years ago.

5. The Decision Below. In the per curiam opinion below, the Ninth Circuit adhered to its decision in *Portland*, and vacated the FCC's ruling that classified cable modem service as wholly an information service. After discussing in

detail its analysis in *Portland*, and concluding that the "regulatory classification of broadband service [was] an essential element of [its] decision," Pet. App. 16a, the court followed its precedent under two lines of reasoning. First, it cited the law of its circuit that binds a three-judge panel to the court's precedent unless the precedent constituted deferential review of agency decisionmaking, and the agency's later conflicting construction is permissible. Pet. App. 17a-19a (citing *Mesa Verde Construction Co. v. Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124 (9th Cir. 1988) (*en banc*)). The court concluded that *Mesa Verde's* requirements for ignoring precedent were not met because *Portland* involved no potential deference to the agency's statutory construction, and "we never said the relevant provisions of the Act were ambiguous." Pet. App. 18a-19a.

Second, the court applied *Neal v. United States*, 516 U.S. 284 (1996), which holds that *Chevron* deference does not apply to an agency's statutory construction that postdates and conflicts with a court's independent judicial construction. Pet. App. 19a-20a.

Judges O'Scannlain and Thomas filed concurring opinions. Judge O'Scannlain expressed uneasiness that stare decisis bound the panel to its precedent, although he noted that an en banc panel could overrule the court's prior decisions. Pet. App. 23a. Judge Thomas, who authored the *Portland* decision, concluded that "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a. Analyzing "the full statutory definition, the overall legislative scheme, and the associated regulatory history," *id.* at 30a, he stated that "[n]othing" in the Act "suggests that the telecommunications component must be priced or offered separately in order to qualify as

a telecommunications service," contrary to the FCC's rationale. *Id.* at 31a. In particular, he cited the FCC's concession that cable modem subscribers may "bypass" the cable company's ISP services and "click through to another [ISP] service," but nevertheless "pay a monthly 'fee' 'directly' to the cable company in order to use 'telecommunications.'" *Id.* at 30a-31a. He further noted that "the FCC consistently recognized that Internet access implied the separate provision of a telecommunications service by some entity," both "in the conventional world of dial-up access over 'plain old telephone service,'" and "when the FCC first applied the 1996 law to integrated broadband services." *Id.* at 31a. He discussed how the "evolution of advanced telecommunications regulation prior to the 1996 Act" under the FCC's Computer II framework "reflect[ed] the same underlying belief [as the 1996 Act] that widespread access to 'basic' transmission facilities would spur competition in 'enhanced services' and provide consumers with a wider variety of more closely tailored products." *Id.* at 35a. While acknowledging that information services and telecommunications services are mutually exclusive, Judge Thomas stated that "nothing suggests that telecommunications service ceased to be so when offered to the public along with an information service." *Id.* at 37a.

The FCC and the cable association thereafter sought rehearing en banc before the Ninth Circuit. The court, however, chose not to revisit *Portland*, and declined to grant en banc review, with no active judge on the Ninth Circuit requesting a vote on whether to rehear the case en banc. Pet. App. 207a. These petitions for certiorari followed.

REASONS FOR DENYING THE PETITIONS

None of the reasons given by the FCC warrants review by this Court. The Ninth Circuit's interpretation of the Act as compelling the conclusion that cable modem service contains a separate telecommunications service is the only one consistent with the Act as a whole, and the only one consistent with the Act's purpose to promote competitive and universal access to high-speed transmission services to enable all Americans to connect to the Internet and to the ISP of their choice. In contrast, the FCC's interpretation is inconsistent with the Act as a whole, and would thwart the Act's central objective by rendering inapplicable the very provisions of the Act designed to promote such access.

Contrary to the FCC's claim, the Ninth Circuit's decision does not in any way require the FCC to regulate cable modem service or otherwise "settle" the question of whether cable modem service should be regulated. The Ninth Circuit explicitly recognized, and did not impinge upon, the broad authority that Congress gave the FCC under § 160 to forbear from enforcing any provision of the Act once the FCC makes the findings that Congress specified. The FCC is not free to circumvent § 160 just because it thinks the procedure may be burdensome.

The Ninth Circuit also correctly applied *Neal* in adhering to its precedent in *Portland* and declining to accord *Chevron* deference to the FCC's statutory interpretation. There is no circuit conflict that is relevant here, and even if in *Portland* the Ninth Circuit had found the statute to be unclear, *Chevron* deference would not have been proper because the FCC's construction is manifestly unreasonable.

The petitions for a writ of certiorari should therefore be denied.

I. THE ACT COMPELS THE CONCLUSION THAT CABLE MODEM SERVICE CONTAINS A TELECOMMUNICATIONS SERVICE COMPONENT, AS THE NINTH CIRCUIT HELD, AND THAT CONCLUSION RAISES NO ISSUE OF NATIONAL IMPORTANCE

1. The Ninth Circuit's decision presents no significant question regarding the interpretation of the statute. Read as a whole, and in light of its legislative history and purpose, the Ninth Circuit correctly concluded that the Act is susceptible only to one reasonable interpretation – that cable modem service is partly telecommunications service and partly information services. The court "did not discern any ambiguity in the statutory meaning for the agency to interpret," and thus "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a (Thomas, J., concurring).

The FCC ignores the fact that "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). That said, the FCC's claim of ambiguity is belied by the very statutory definitions upon which it principally relies. In § 153(20), an "information service" is defined as the "offering of a capability for . . . making available information via telecommunications." "Telecommunications" in turn is defined in § 153(43) as "the transmission . . . of information of the user's choosing," "between or among point specified by the user," "without change in the [information's] form and content." When "telecommunications" is "offer[ed] for a fee directly to the public or to such

classes of users as to be effectively available directly to the public," it is a "telecommunications service" "regardless of the facilities used." § 153(46).

A straightforward application of these definitions demonstrates that a cable operator's offering of cable modem service is partly a telecommunications service and partly information services. The cable operator generally advertises its cable modem service directly to the public. And like the telephone company that offers functionally similar DSL service with its Internet-based information services, the cable operator charges a fee for the high-speed transmission link between the customer and the Internet, and for the Internet-based information services that the cable operator's ISP provides over it. Nothing in the Act suggests that because the cable operator chooses to charge a single fee for the two services, that fact transforms the two services into one. Pet. App. 31a (Thomas, J., concurring).

The FCC has conceded that there is a separate "telecommunications" component to cable modem service, but has never adequately explained why, when that component is offered for a fee to the public, it is not a "telecommunications service" as defined in § 153(46). The FCC's only response is that because the "telecommunications" component is not offered on a stand-alone basis, it cannot be a "telecommunications service." Pet. App. 97a. The FCC points to no textual support in the Act to support its theory, nor is there any. The FCC, of course, is not free to insert words into a statute that Congress did not supply. *United States v. Calamaro*, 354 U.S. 351, 359 (1957).

Nor is there any ambiguity in the phrase "via telecommunications" within § 153(20) that supports the FCC's

claim that a cable operator merely "uses" telecommunications but does not offer it for a fee to the public when selling its cable modem service. Pet. App. 97a-98a.[8] The inclusion of that phrase in § 153(20) simply defines "information services" as those that require "telecommunications" or transmission over the electromagnetic medium for their delivery, as distinguished from information services that use other media and are beyond the scope of the Communications Act. *See* H.R. Rep. No. 104-204, at 125-26, 1995 WL 442504 (July 24, 1995) (confirming the term "telecommunications" relates to the type of transmission medium underlying the provision of information services.) For example, absent the "via telecommunications" clause in the statute, a legal research service that stores, retrieves, organizes and provides to customers binders containing the legislative histories of specific statutes would qualify as an "information service" because it is a service "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." § 153(20). Similarly, absent the "via telecommunications" clause, all public library services would fall within the ambit of § 153(20).

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[8] In its *Universal Service Report,* the FCC stated that an ISP's mere transmission of unaltered data does not imply than an information service contains a telecommunications service component. However, the ISPs referred to "typically, own no telecommunications facilities. Rather, in order to provide those components of Internet access services that involve information transport, they lease lines, and otherwise acquire telecommunications, from telecommunications providers." 13 F.C.C.R. at 11,540, ¶ 81. In other words, as Judge Thomas noted, "*someone* still has to provide telecommunications service. . . . In the integrated cable modem context, the same company provides these two, entirely separate services." Pet. App. 38a (emphasis in orig.).

Obviously, these services are not subject to the Communications Act.

The Act's legislative history further indicates, as Judge Thomas noted, that "'telecommunications service' was distinguished from 'telecommunications' largely in order to exclude internal, privately provided telecommunications networks." Pet. App. 36a (discussing H.R. Rep. No. 104-204, at 126, 1995 WL 442504) (the term "telecommunications service" "recognizes the distinction between common carrier offerings that are provided indifferently to the public or to such classes of users as to be effectively available to a substantial portion of the public, and private services").

The definition of "telecommunications carrier" as "any provider of telecommunications services" in § 153(44) also confirms Congress' understanding that companies may simultaneously offer both telecommunications services and information services, by specifying that Title II's requirements apply "only to the extent that [the provider] is engaged in providing telecommunications services." Pet. App. 32a-33a.

Other provisions of the Act buttress the Ninth Circuit's statutory interpretation. In § 706(a), Congress instructed the FCC and state commissions "*with regulatory jurisdiction over telecommunications services*" to use their regulatory powers in order to encourage the deployment of "advanced telecommunications capability." And "advanced telecommunications capability" includes cable broadband transmission, as the FCC concedes. FCC Pet. at 3. As Judge Thomas noted, these regulatory powers have "traditionally been applied to basic transmission services rather than enhanced information services." Pet.

App. 33a; *see also* S. Rep. No. 104-23, at 51, 1995 WL 142161 (Mar. 30, 1995) ("the bill encourages States and the FCC to utilize *regulatory* incentives . . . as a means to promote the deployment of broadband capability") (emphasis added). It is not a sensible reading of the statute to conclude that in one provision Congress would direct agencies to use their regulatory authority to promote the deployment of broadband technologies, and in another provision exempt from regulation an entire class of broadband transmission services.

In short, there is no ambiguity in the Act's definitions on how Congress intended to classify cable modem service. That service contains a separate telecommunications service component, as the Ninth Circuit correctly held.

2. Not only did the Ninth Circuit correctly classify cable modem service under the Act, but that is the only reasonable interpretation of the Act. The FCC's construction is not. Thus, even if the statute were susceptible to more than one reasonable interpretation, the FCC's would not deserve deference under *Chevron* step-two.

The FCC chiefly argues that its classification of cable modem service is consistent with the Act because cable operators generally choose to sell the transmission component of that service bundled with the information service component, rather than as a stand-alone service. Pet. App. at 97a.[9] Because of that bundling, the FCC asserts that its

[9] Contrary to Verizon's post hoc claim (Verizon Br. at 27), the FCC's ruling exempting cable operators from Title II obligations was not based on a finding that they lacked market power in the broadband market. The FCC's ruling exempts cable operators from Title II, even if they hold monopoly power in a given market, because they bundle broadband transmission with

(Continued on following page)

Computer II obligations are inapplicable to cable modem service, and in any event they would apply only to telephone companies and service provided over wireline, not cable, facilities. *Id.* at 100a. The FCC's arguments are seriously flawed for at least two reasons.

First, Computer II, which embodies the nondiscrimination principles of the Act, is based precisely on the fact that telephone companies otherwise would choose not to make a stand-alone offering of transmission service if they could escape Title II regulation merely by bundling transmission with their own information services. The FCC previously understood this as well when, subsequent to the Act's adoption, it told Congress that a telephone company could not avoid its common carrier obligations simply by packaging its transmission service with information services for sale to the public. *See Universal Service Report*, 13 F.C.C.R. at 11,530, ¶ 60.

Second, the FCC's argument that Computer II applies "exclusively to traditional wireline services and facilities" and that the FCC has "never . . . applied Computer II to information services provided over cable facilities" relies on a distinction based on transmission "facilities" or "technology" that Congress expressly proscribed. §§ 153(46) & 706(c)(1); Pet. App. 100a-102a. In any event, the fact that telephone companies differ because they may also offer access to the Internet separately from their Internet-based

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information services. However, even if the FCC had found an absence of market power, ignoring the fact that cable holds nearly a two-thirds share of the residential broadband market, the FCC would have been obliged to comply with the regulatory forbearance requirements in § 160 if it wished to exempt cable operators from Title II.

information services derives from an historical anomaly, not any evidence of congressional intent. Indeed, as Judge Thomas discusses, the history that is relevant is the "evolution of advanced telecommunications regulation prior to the 1996 Act [that] reflects the same underlying belief that widespread access to 'basic' transmission facilities would spur competition in 'enhanced services' and provide consumers with a wider variety of more closely tailored products." Pet. App. 35a (citation omitted). He correctly concluded that applying Computer II's framework to cable modem service "would enhance independent ISP access to telecommunications facilities, almost certainly increasing consumer choice." Pet. App. 34a.

The FCC nevertheless asserts that transmission is "part and parcel" of cable modem service but that assertion is belied by the FCC itself. Pet. App. 96a. It concedes that cable modem subscribers are able to completely "bypass that company's web browser, proprietary content, and e-mail" and "'click through' to another service" for an additional fee. *Id.* at 30a-31a (Thomas, J., concurring). The FCC further concedes that some cable operators actually do offer transmission on a stand-alone basis to unaffiliated ISPs. *Id.* at 111a.

In addition, the FCC's statutory interpretation is wholly inconsistent with § 706(a) of the Act. If cable modem service does not contain a telecommunications service component, as the FCC contends, then Congress' directive to the FCC to promote ubiquitous access to "advanced telecommunications capability" by "regulating methods" relates to nothing. The FCC renders this language superfluous. *See United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (court must give effect to every clause and word of statute).

Finally, the FCC's statutory construction subverts congressional intent by rendering inapplicable to cable modem service all of the Act's provisions that promote competitive and universal access to broadband capability. Most significantly, because much of Title II applies only to providers of telecommunications services, the FCC's interpretation would allow potentially any broadband provider to evade Title II's requirements and all of the consumer protections attendant to it by simply bundling its transmission offering with information services. Specifically, as the FCC concedes, these providers would not be required to comply with the traditional obligations of common carriage that ensure affordable and reliable access to the Internet by low-income, disabled and rural customers, or by school children and public libraries. §§ 254(b)(2), (3), (6); 255. Nor would providers be required to offer to their competitors nondiscriminatory access to broadband services so that customers have a choice of Internet-based services from numerous providers at lower prices. §§ 201 & 202; FCC Pet. at 25. It is inconceivable that Congress meant to categorically exempt cable operators, who control nearly two-thirds of the residential and small business broadband market, from these obligations.

The FCC nevertheless complains that the Ninth Circuit's decision places the agency "on the horns of a dilemma." FCC Pet. at 27. But it is the FCC that places itself there by classifying cable modem service differently from DSL service, and on a basis that Congress proscribed. By the statutory construction it seeks to impose, it is the FCC, and not the Ninth Circuit, that thwarts the implementation of the Act by abrogating the principles of nondiscrimination and interconnectivity underlying the Act so that "broadband services [are] made available to 'all

regions of the Nation.'" FCC Pet. at 3 (quoting 47 U.S.C. § 254(b)(2)).

In short, the FCC's statutory construction "strays far afield from the regulatory construct established by Congress." Pet. App. 198a (Comm. Copps dissenting). It is not a permissible interpretation of the Act triggering *Chevron* deference.

3. The Ninth Circuit's decision does not, contrary to the FCC's dire claim, create "immediate and urgent difficulties in the communications industry that warrant intervention by this Court" by tying the FCC's regulatory hands. FCC Pet. 24. The FCC itself acknowledges, and the Ninth Circuit expressly recognized, that the FCC is not compelled to regulate cable modem service, or any broadband transmission service, if it makes the requisite findings for regulatory forbearance that Congress specified in § 160. Congress specifically cited that option in § 706(a), and the Ninth Circuit properly left to the FCC the national policy decision of whether to regulate the service in whole, in part, or not at all. *See Portland*, 216 F.3d at 879-80.

The FCC complains that regulatory forbearance is "not an adequate substitute" for classifying cable modem service in the way that it did, because that procedure is too burdensome. FCC Br. at 27. The short answer is that the FCC's complaint must be made to Congress, not this Court, because regulatory forbearance is the procedure dictated by Congress if the FCC does not want to enforce any of Title II's provisions. The FCC is not free to circumvent it by rewriting the Act.

II. THE NINTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT OR ANY OTHER COURT OF APPEALS

Petitioners' claim that the Ninth Circuit erred in relying on *Neal*, and that the Court should grant review to clarify or limit the scope of *Neal* is, at best, just a distraction. Contrary to their assertion, there is no confusion – and no circuit split – concerning *Neal's* application or scope. According to petitioners, courts are confused whether *Neal* applies only in cases where the statute at issue is unambiguous, or whether *Neal* requires courts to apply stare decisis regardless of the statute's ambiguity. But this simply is not true. The few courts to have considered *Neal* have applied it consistently with the way the Ninth Circuit did here. *See Bankers Trust U.S. Corp. v. United States*, 225 F.3d 1368 (Fed. Cir. 2000); *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (court not compelled to defer to agency). The CPUC is aware of, and petitioners cite, no circuit court decision that has considered *Neal* and opined that stare decisis is appropriate only when the court's earlier decision interpreted an unambiguous statute.[10]

[10] Most of the cited cases pre-date *Neal*, and hence are irrelevant. Those that post-date *Neal* all are distinguishable. In *Reich v. D.M. Sabia Co.*, 90 F.3d 854, 858 (3d Cir. 1996), the Third Circuit held that it was not bound by its prior interpretation of a statute because, *inter alia*, the statute had been amended since the court's earlier decision. *Heimmermann v. First Union Mort. Corp.*, 305 F.3d 1257, 1263 (11th Cir. 2002) neither cites nor discusses *Neal*. And *Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996), actually holds, like the Ninth Circuit, that once a court has construed a statute prior to an agency having interpreted it itself, the agency is not free to adopt a contrary interpretation.

In any event, even if the scope of *Neal* were unclear, or even if the Court might want to revisit the issues decided in *Neal*, this is not an appropriate case in which to do that. As the Court has repeatedly admonished, "this Court reviews judgments, not opinions." *Chevron*, 467 U.S. at 842. Accordingly, the fundamental issue here is not the Ninth Circuit's reliance on *Neal*, but whether the Ninth Circuit's judgment was correct that the telecommunications portion of cable modem service is a "telecommunications service" within the meaning of the Act. As detailed above, the Act, read as a whole and in light of its legislative history and purpose, is susceptible to only one reasonable answer to this question: the one announced by the Ninth Circuit in *Portland*, and reaffirmed in the decision below. Thus, even if there were a question whether *Neal* requires or permits a court to defer to an agency's interpretation of a statute after an earlier court already has construed the statute, that question is irrelevant here. Because the statute is susceptible to only one reasonable interpretation, the question of *Chevron* deference, and whether *Neal* leaves any room for it, simply is not presented in this case. There is no need, or even context, in this case to consider the relationship between *Neal* and *Chevron* deference, as the petitioners ask the Court to do.

Moreover, even if the statute were ambiguous, as the FCC contends, there still would be no reason to consider *Neal*'s relationship to *Chevron* in this case. Regardless of *Neal's* scope, a court must afford *Chevron* deference to an agency's interpretation of a statute only if the agency's interpretation of the statute is reasonable. *See Chevron*, 467 U.S. at 844. Here, as explained above, the FCC's interpretation is manifestly *not* reasonable.

CONCLUSION

For the reasons stated, the petitions for a writ of certiorari should be denied.

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September 30, 2004

STATUTORY APPENDIX

47 U.S.C. § 153 Definitions

(20) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Advanced Telecommunications Incentives

Section 706 – Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended Pub.L. 107-110, § 1076(gg), Jan. 8, 2002, 115 Stat. 2093 (uncodified, but reproduced at note to 47 U.S.C. § 157) provided that:

(a) In general. – The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry. – The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In

the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Definitions. – For purposes of this subsection:

(1) Advanced telecommunications capability. – The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools. – The term 'elementary and secondary schools' means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 7801].

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47 U.S.C. § 160 Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in

any or some of its or their geographic markets, if the Commission determines that –

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

. . . .

---

47 U.S.C. § 201 Services and charges

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful:

. . . .

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47 U.S.C. § 202 Discrimination and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classification, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

. . . .

---

47 U.S.C. § 254 Universal Service

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

. . . .

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

. . . .

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

. . . .

(h) Telecommunications services for certain providers

. . . .

(2) Advanced services

The Commission shall establish competitively neutral rules –

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; . . .

. . . .

RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

Nos. 04-277 & 04-281

SEP 20 2004

IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Petitioners,

AND

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS BELLSOUTH AND SBC IN SUPPORT OF PETITIONS FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Federal Communications Commission is permitted to conclude that broadband Internet access does not include a "telecommunications service" under the Telecommunications Act of 1996, but rather is solely an "information service."

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, BellSouth Telecommunications, Inc., and SBC Communications Inc. state the following:

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation, a publicly held corporation. BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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THE COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS DECIDED AN ISSUE OF EXCEPTIONAL NATIONAL SIGNIFICANCE WITHOUT ADHERING TO ESTABLISHED PRINCIPLES OF JUDICIAL REVIEW

This case is critically important to the development of the market for broadband Internet access in the United States. These competitive, fast-evolving services hold vast potential for providing consumers with innovative products and stimulating the nation's economy generally. In section 706 of the Telecommunications Act of 1996 ("1996 Act"), moreover, Congress directed the FCC to facilitate the widespread deployment of broadband facilities. That ambitious goal, however, has remained mired in a patchwork of confused and contradictory regulatory rules that generally predate the 1996 Act, that are predicated on outdated technologies, and that forestall the substantial investment necessary to bring broadband to all consumers.

Recognizing this, the Federal Communications Commission ("FCC" or "Commission") has taken definitive steps towards establishing a coherent regulatory framework that applies equally to all providers of broadband — including not just the cable providers that are petitioners here, but also telephone companies such as SBC and BellSouth — while ensuring that consumers have access to a broad array of information and services. The FCC order at issue here is a key part of that effort. It classifies cable modem service — the leading broadband Internet access service — as an "information service" under the 1996 Act, and it sets the stage for the FCC to construct a coherent broadband regulatory framework around that classification. Indeed, at the same time as it released the order at issue here, the FCC tentatively concluded that the same classification applies to broadband Internet access provided by telephone companies, and it further announced an initiative to develop a policy framework, based on that classification, that "encourage[s] the ubiquitous availability of broadband to all Americans," that "promotes investment and innovation in a competitive market," and

that "is consistent, to the extent possible, across multiple platforms." Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd 3019, 3021-23, ¶¶ 3-6 (2002) ("*Wireline Broadband NPRM*").

The Ninth Circuit's decision below throws that process into disarray. In conflict with the considered judgment of the FCC, it declares that broadband Internet access provided over cable systems includes a "telecommunications service" and is thus subject to common-carrier regulation under Title II of the Communications Act of 1934. By its own admission, moreover, the Ninth Circuit does so on the basis of its own circuit precedent, without affording the FCC the deference called for by *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

As petitioners the United States and the National Cable & Telecommunications Association ("NCTA") explain, the Ninth Circuit's conclusion that its own precedent trumps the considered judgment of the FCC is both incorrect and in conflict with other courts of appeals, which is reason enough to grant certiorari. But at least as important is the fact that the court of appeals' decision unhinges a regulatory initiative that affects a critical sector of the nation's economy. This Court's review is necessary to ensure that the FCC's pro-competitive regulatory initiative is evaluated on the merits, pursuant to the principles of administrative review set out in *Chevron*.

A. Today's broadband regulatory environment is out-of-step with the marketplace. The market for broadband Internet access is highly competitive. As the FCC has found, the market is characterized by "a continuing increase in consumer broadband choices" offered over a wide array of transmission platforms, including cable facilities, telephone lines, satellite, fixed wireless, and mobile wireless. *E.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11864-65, ¶¶ 18-19 (2000).

Despite the fact that these various transmission platforms compete directly against one another head-to-head in this vitally important market — and have been doing so for years — there remains significant uncertainty as to their regulatory status, including whether competing technologies will be regulated uniformly under federal law. Until the order at issue here, for example, the FCC had not classified cable modem service, which is the leading form of broadband Internet access, much less articulated rules that would apply to that particular service. As a result, cable operators provided cable modem service largely free from any federal regulation, while at the same time contending with the regulatory efforts of state and local franchising authorities. The FCC has been similarly silent with respect to fixed wireless and satellite, creating uncertainty over the potential scope of regulation with respect to those broadband platforms as well.

Meanwhile, the FCC has regulated digital subscriber line ("DSL") service provided by telephone companies — which control barely one-third of the broadband market — as though it were provided in a monopoly environment. Three decades ago, the FCC initiated a proceeding, known as the *Computer Inquiries*, to examine the relationship between the then-nascent computer industry and the public switched telephone network. The various rules that grew out of that proceeding were predicated on the understanding that the public switched telephone network was the exclusive means for transmitting the "ever expanding variety of information" made possible by new "computerized data processing" technologies, as well as the concern that "the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing." *California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994).

Based on this understanding and concern, the FCC imposed an array of regulatory requirements upon the incumbent telephone companies (such as SBC and BellSouth)

insofar as they wanted to provide so-called "enhanced" (or "information") services. The Commission broadly defined enhanced services to include "any offering over the telecommunications network . . . more than a basic transmission service." Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420, ¶ 97 (1980) ("*Computer II*"); *see also* 47 C.F.R. § 64.702(a) (defining "enhanced service[s]" as, *inter alia*, services "which employ computer processing applications that act on the format . . . of the subscriber's transmitted information"). And, although the specific rules that governed telephone-company provision of such enhanced services evolved over the next decade, the FCC eventually settled on a regime in which local telephone companies were required to provide the transmission component of their enhanced services to unaffiliated Internet service providers ("ISPs") separately on a common-carrier basis, pursuant to tariff. *See* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 964, ¶ 4 (1986) ("*Computer III*").

As a result, while most competitors could offer enhanced services free from regulation, telephone companies offering such services also were required to offer competing providers a pure transmission service that the FCC could regulate as common carriage — *i.e.*, as a "telecommunications service" — under Title II of the Communications Act.

The *Computer Inquiries* proceeding itself was predicated on the existence of a "one-wire world" in which all enhanced service providers required access to the telephone network. However, as telephone companies in recent years have rolled out competitive *broadband* Internet access services using DSL, the FCC has simply assumed, without ever scrutinizing the issue in any depth, that the *Computer Inquiries* rules apply. *See, e.g.*, Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) (noting without analysis

"that [Bell Operating Companies ('BOCs')] offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services"). That assumption has resulted in a distorted regulatory regime in which broadband service providers operate free from regulation, unless they happen to be telephone companies that rely upon their own local exchange facilities to provide DSL. In that case alone, the service provider must perform what the FCC has properly termed "radical surgery" in order to offer the underlying broadband transmission path on a common-carrier basis, without the associated Internet access service. FCC Pet. App. 100a-101a (¶ 43).

This haphazard state of regulatory affairs — in which the non-dominant segment of the broadband market is regulated as dominant, while everyone else is left to guess over the rules that will ultimately apply — is significantly inhibiting the deployment of broadband. It has created substantial uncertainty over the extent to which various potential broadband platforms will be subject to regulation, and whether they will compete on a level playing field, thus undermining the certainty that is necessary to warrant the massive investments needed to build-out broadband facilities on a widespread basis.

B. Recognizing the compelling need for reform, the FCC undertook a comprehensive effort to bring uniformity and coherence to the regulation of broadband. The *Declaratory Ruling* at issue here is the first step in that effort. There, the FCC for the first time classifies broadband Internet access provided over cable facilities. It first reaches the unremarkable (and uncontested) conclusion that cable modem service is an "information service" under the 1996 Act. *See* FCC Pet. App. 91a-95a (¶¶ 36-38); *see also* 47 U.S.C. § 153(20) (defining "information service"). It then makes clear that the cable operators that provide this service are not subject to the FCC's *Computer Inquiries* rules, and that — contrary to the Ninth Circuit's prior assumption in *AT&T Corp. v. City of*

Portland, 216 F.3d 871, 878 (9th Cir. 2000) — they (unlike telephone companies) therefore need not separate out a distinct pure transmission service and offer it to unaffiliated service providers on a common-carrier basis. *See* FCC Pet. App. 98a-102a (¶¶ 42-44). And, because the cable operators are not required to offer such pure transmission separately on standardized terms — and because they generally have not elected to do so to date — the FCC also concludes that cable modem service is not a "telecommunications service." *See id.* at 95a-98a, 109a-114a (¶¶ 39-41, 52-55). Instead, in those instances where cable operators do provide unadorned transmission to unaffiliated service providers, they do so as "private carriage." *See id.* at 109a-114a (¶¶ 52-55).

Although the *Declaratory Ruling* is a necessary first step in providing clarity and coherence to the regulation of broadband, it does not stand alone. In three companion notices of proposed rulemaking — one attached to the *Declaratory Ruling* itself, and the others issued some months earlier — the Commission tentatively concluded that DSL-based broadband Internet access service, like cable modem service, would be regulated solely as an "information service," and it further invited comment on a regulatory framework that would apply to *both* DSL-based service and cable modem service. *See id.* at 133a-168a (¶¶ 72-112); *Wireline Broadband NPRM*, *supra*; Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745 (2001). Although the notices are broad and the FCC is reviewing a wide variety of proposals, the Commission has articulated principles that will guide its analysis of the questions it has posed. As noted at the outset, the Commission has pledged to "encourage the ubiquitous availability of broadband to all Americans," "promote[] investment and innovation in a competitive market," and regulate "consistent[ly], to the extent possible, across multiple platforms." *Wireline Broadband NPRM*, 17 FCC Rcd at 3021-23, ¶¶ 3-6; *see also* FCC Pet. App. 134a-135a (¶ 73). Thus, before the decision below, the FCC had initiated a comprehensive process with

the goal of bringing much needed certainty and coherence to the regulation of broadband Internet access.

C. The Ninth Circuit's decision creates an ill-considered and unnecessary obstacle to the FCC's reform efforts. The decision correctly holds, consistent with the FCC's order, that broadband Internet access provided over cable is an "information service" under the 1996 Act. But, contrary to the FCC's order, the decision further holds that broadband Internet access provided over cable also includes a "telecommunications service" component that is subject to regulation under Title II of the Communications Act.

The Ninth Circuit's decision is worthy of this Court's review for two reasons. *First*, the *manner* in which the Ninth Circuit reached its decision is out-of-keeping with well-established principles of judicial review of administrative action. Believing itself bound by its prior *City of Portland* decision — in which the Ninth Circuit unnecessarily and incorrectly opined on the statutory classification of cable modem service — the Ninth Circuit expressly refused to apply *Chevron*. In effect, then, the Ninth Circuit disregarded the views of the FCC, the expert agency Congress has charged with interpreting and implementing the 1996 Act in the first instance, and arrogated to itself the responsibility of setting national telecommunications policy. That approach is wrong, and, as the United States and NCTA explain, it is in conflict with decisions of other courts of appeals. Certiorari will thus enable this Court to resolve a circuit split on the appropriate role of circuit precedent in reviewing the reasonableness of subsequent agency decisions.

Second, and at least as important, the *effect* of the Ninth Circuit's decision is to undermine the FCC's efforts to create coherent regulatory policy for broadband. As the United States properly notes, the aim here is to create a broadband policy framework that is "consistent across multiple platforms." FCC Pet. 27 (internal quotation marks omitted). Accordingly, the Ninth Circuit's decision, in addition to unraveling the FCC's efforts with respect to broadband Internet access over cable, threatens to undo the Commission's efforts

to create a regulatory framework for broadband generally. Indeed, in the wake of that decision, *all* of the FCC broadband regulatory proceedings noted above have come to a screeching halt, leaving in place the uncertainty that has already plagued this critically important market for close to a decade. This Court's review is necessary to ensure that the lawfulness of the FCC's plan for eliminating that uncertainty is determined not on the basis of a Ninth Circuit precedent in a case to which the FCC was not even a party, but rather on its merits, pursuant to the principles set out in *Chevron*.

CONCLUSION

The Court should grant the petitions for a writ of certiorari.

Respectfully submitted,

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September 20, 2004

RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

(3) (4)

Nos. 04-277 & 04-281

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IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

-and-

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES,

Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE VERIZON TELEPHONE COMPANIES, GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS, and VERIZON INTERNET SERVICES INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the statutory definitions contained in the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*, prohibit the Federal Communications Commission from classifying broadband Internet access service as one integrated "information service," subject to minimal regulatory constraints, without any separately regulated "telecommunications service" component.

PARTIES TO THE PROCEEDING

Respondents adopt the list of parties to the proceeding in the court of appeals that is contained in the Petition for a Writ of Certiorari filed by the Federal Communications Commission and the United States, with the exception of the proper "Verizon" respondents as listed below pursuant to Rule 29.6

RULE 29.6 DISCLOSURE

Respondents the Verizon telephone companies, listed below, are wholly owned subsidiaries of Verizon Communications Inc.:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Respondent GTE.Net LLC d/b/a Verizon Internet Solutions is a wholly-owned subsidiary of Verizon Technology Corp., which itself is an indirect, wholly-owned subsidiary of Verizon Communications Inc.

Respondent Verizon Internet Services Inc. is a wholly-owned subsidiary of Bell Atlantic Entertainment and Information Services Group Inc., which itself is an indirect, wholly-owned subsidiary of Verizon Communications Inc.

Verizon Communications Inc. is a publicly held corporation. Verizon Communications Inc. does not have a parent company, and no publicly held company has a ten-percent or greater interest in it.

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Pursuant to Rule 12.6 of the Rules of this Court, the Verizon telephone companies, GTE.net LLC d/b/a Verizon Internet Solutions, and Verizon Internet Services Inc. (collectively "Verizon") submit this response in support of the Petitions for Writs of Certiorari filed by: (1) the Federal Communications Commission (the "FCC" or the "Commission") and the United States of America; and (2) the National Cable & Telecommunications Association, Charter Communications, Inc., Cox Communications, Inc., Time Warner Inc., and Time Warner Cable Inc. (collectively "NCTA").

The Ninth Circuit's decision that cable modem service provided to retail subscribers must contain a separate "telecommunications service" subject to outdated common carrier regulations is a gross misinterpretation of the statutory definitions in the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.* (the "Communications Act" or the "Act"), and represents an unprecedented judicial arrogation of power over national telecommunications policy. The Ninth Circuit's ruling has introduced uncertainty into the entire broadband market, stifling investment and frustrating the goal of both Congress and the FCC to promote the deployment of advanced communications technologies.

The *per curiam* decision of the panel below conflicts with both FCC and judicial precedent regarding the distinction between services that should be regulated as common carriage and those that must be subject to a substantially lighter regulatory touch. The Ninth Circuit placed legal handcuffs on the FCC's ability to properly classify broadband technology, based not on a clear and unambiguous expression of congressional will, but based instead on its own prior (and incorrect) statutory analysis conducted without the benefit of a formal decision rendered by the Commission. Because the issue is of national importance, because the Ninth Circuit ignored well-established principles of both communications law and administrative law, and because

the decision below conflicts with both FCC and D.C. Circuit precedent, the Petitions for Writs of Certiorari should be granted.

OPINION AND ORDER BELOW

Verizon adopts the statement regarding the opinion and order below that is contained in the Petition for a Writ of Certiorari filed by the FCC and the United States.

STATEMENT OF JURISDICTION

Verizon adopts the statement of jurisdiction that is contained in the Petition for a Writ of Certiorari filed by the FCC and the United States.

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Communications Act: 47 U.S.C. §§ 153(20), 153(43), 153(46), 160(a), 230, 254, and 522. This case also involves Section 706 of the Telecommunications Act of 1996, § 706, Pub. L. No. 104-104 ("1996 Act"), 110 Stat. 153, *reprinted in* 47 U.S.C. § 157 note.

47 U.S.C. §§ 153(20), 153(43), 153(46), 160(a), 230, 254, and 522 are reprinted at FCC Pet. 208a-213a. Section 706 of the 1996 Act is reprinted at Resp.18a-20a.[1]

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1. Citations to "FCC Pet." are to the Petition for a Writ of Certiorari filed by the FCC and the United States. Citations to "NCTA Pet." are to the Petition for a Writ of Certiorari filed by NCTA. Citations to "Resp." are to the instant response in support of certiorari. For the convenience of the Court, this response includes a supplemental appendix containing the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), in addition to Section 706 of the 1996 Act, *see* Rule 14.1(*i*)(ii), 14.1(f).

STATEMENT

A. Legal And Factual Background

1. The National Policy Goal Of Promoting Broadband Investment And Deployment

This case involves the proper statutory classification, and hence the proper regulatory treatment, of broadband (or "high-speed") services used to access the Internet. Broadband services allow the retrieval of information from the Internet in "real-time" and the reception of high-quality graphics, pictures, and even audio and video through the Internet, at speeds up to twenty times faster than telephone narrowband (or "dial-up") connections. *See* FCC Pet. 54a.

Numerous competitors using different "last mile" transmission technologies currently offer broadband Internet access service. Broadband service offered over cable networks is referred to as "cable modem service." *See id.* at 50a. The first generation of wireline broadband services offered by telephone companies, including Verizon, are called "digital subscriber line" ("DSL"). Verizon has recently started to deploy the next generation of wireline broadband services, referred to as "fiber-to-the-premises" ("FTTP"). Verizon's FTTP network will allow data speeds ten times faster than cable modem or DSL service, will include a separate path for video transmissions, and will be more reliable and less costly to maintain than are today's copper-based technologies. Satellite operators, fixed and mobile wireless companies, and utility providers currently offer broadband services in competition with cable modem service and DSL. *See, e.g.*, *Availability of Advanced Telecomms. Capability in the United States*, FCC 04-208, at 8, 13, 14-23 (2004) ("*Fourth Section 706 Report*"), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-208A1.pdf.

Broadband allows businesses to increase productivity, resulting in substantial economic and job growth. *See* FCC Pet. 4. Consumers receive benefits in the form of more efficient service from the business sector, and also in the form of new applications that broadband enables, such as public safety services, telecommuting, education, telemedicine, and employee training.[2] Broadband also fuels the development of new and innovative services, including Internet-delivered video, audio, and voice communications. For example, broadband connections have made possible "voice-over-Internet-protocol" (or "VOIP") services, which now compete with traditional telephone services. *Fourth Section 706 Report*, at 24. Next-generation networks, including the FTTP networks that Verizon is deploying, will allow video offerings in competition with the video programming services currently available from broadcast, cable television, and satellite operators.

It is not surprising then that over the last several years the popularity of broadband services has grown exponentially. Indeed, broadband Internet access recently surpassed dial-up for the first time as the primary mode of Internet access in this country. *See* Vauhini Vara, *High-Speed Surpasses Dial-Up as Top Home Web Access in U.S.*, Wall St. J., Aug. 18, 2004, at D4. As of April of 2004, fifty-five percent of adult Internet users had broadband at home or work. *See Fourth Section 706 Report*, at 32.

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2. *See Fourth Section 706 Report*, at 24, 28, 47; *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion*, 19 F.C.C.R. 5136, 5136-37 (2004); FCC, News Release, *Unleashing the Educ. Power of Broadband* (Sept. 8, 2004), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-251908A1.pdf (quoting FCC Chairman Michael K. Powell as stating that "[b]roadband is an essential tool to prepare today's young people for tomorrow's workforce and to facilitate lifelong learning for students of all ages"); Matthew D. Bennett, Alliance for Public Technology, *A Broadband World: The Promise of Advanced Servs.*, 2003, *at* http://apt.org/confer/broadband-world.pdf.

To make the promise of broadband widely available, broadband providers, including both cable operators and wireline telephone companies, have already spent billions of dollars upgrading their existing infrastructure and building new facilities. The United States, however, still lags behind other nations in terms of broadband penetration, ranking eleventh in a recent study. *See id.* at 40 (Chart 14). Because "the infrastructure of today may be insufficient to support the applications of tomorrow," significant additional capital investment is needed to ensure that all Americans, regardless of income level or geographic location, can have access to this critical new technology. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3022 (2002) ("*Wireline Broadband NPRM*").

Congress has made clear that encouraging broadband investment and deployment is among the nation's central communications policy goals. In the 1996 Act, Congress sought to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services." S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement). This national broadband policy was specifically codified. Thus, by statute it is "the policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). Congress further directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other things, "utilizing . . . regulatory forbearance, measures that promote competition," and other "methods that remove barriers to infrastructure investment." 1996 Act, §§ 706(a) & (b). Consistent with these statutory expressions of national policy, the FCC has stated that "[t]he widespread deployment of broadband infrastructure has become the central

communications policy objective of the day." *Wireline Broadband NPRM*, 17 F.C.C.R. at 3020-21 (footnote omitted).[3]

2. The Communications Act's Distinct Service Definitions

Three statutory definitions are relevant to this case, each one of which was added to the Communications Act by the 1996 Act: (1) "telecommunications," (2) "telecommunications service," and (3) "information service." 47 U.S.C. §§ 153(43), 153(46), 153(20). The matter in dispute is whether cable modem service offered to retail subscribers should be classified as an "information service" that uses a "telecommunications" component to perform the transmission function, as the FCC found, FCC Pet. 88a-116a, or whether the statutory definitions in the Act require the FCC to find a separate "telecommunications service" offering buried inside every broadband Internet access service, as the Ninth Circuit directed, *id.* at 21a-22a. In essence, the Ninth Circuit held that every broadband service must be taken apart (or "unbundled") and that the transmission component of such services must be broken out and subject to common carrier regulations.

The broadest of the statutory terms at issue here is "telecommunications," which is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The definition encompasses any "pure transmission" function,

3. *See IP-Enabled Servs.*, 19 F.C.C.R. 4863, 4865 (2004) ("*VOIP NPRM*") (recognizing "the paramount importance of encouraging deployment of broadband infrastructure to the American people") (footnote omitted); Kevin J. Martin, Commissioner, FCC, *A New Framework for Broadband Deployment*, Remarks to the TIA Regulatory Session at Supercomm, Atlanta, Georgia, at 1 (June 3, 2003), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-235271A1.pdf (stating that broadband is the Commission's "top priority").

including those used in the delivery of other defined services under the Act. Well before the passage of the 1996 Act, both the FCC and the federal courts had recognized that many "pure transmission" functions are not subject to common carrier regulation. *See, e.g.*, *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976) ("*NARUC I*") (upholding Commission decision to treat certain commercial mobile services as non-common carrier telecommunications).

The second statutory classification is a subset of the first. A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46). Both the FCC and the federal courts have construed the definition of "telecommunications service" to be synonymous with the concept of common carriage as developed and applied by both the FCC and the federal courts prior to the enactment of the 1996 Act. *Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8521-22 (1997); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999).[4]

The *sine qua non* of a common carrier service has always been an undertaking to serve all customers indiscriminately, whereas a non-common carrier reserves the right to refuse service or to provide service on individualized and distinct terms and conditions. *NARUC I*, 525 F.2d at 642; *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976). The common carriage undertaking may be voluntary or it may be imposed by regulation. Historically, in the absence of a voluntary undertaking to provide a service on a common carrier basis, such duties have been imposed on a transmission

4. *See* H.R. Conf. Rep. No. 104-458, at 115 (Joint Explanatory Statement) (stating that the definition of telecommunications service in the 1996 Act "recognize[es] the distinction between common carrier offerings . . . and private services").

service only where substantial market power necessitates government regulation of both access and price. *See, e.g.*, *Virgin Islands Tel.*, 198 F.3d at 925-27.

Finally, the Act defines an "information service" as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." 47 U.S.C. § 153(20). Services falling within this definition, which involve the generation and manipulation of content, must still be delivered to end-users through some form of transmission. The definition therefore recognizes that all "information services" are made available "via telecommunications." *Id.* By using the broader term "telecommunications," rather than the narrower term "telecommunications service," the statute expressly recognizes that the transmission component of an information service may be either a common carrier or a non-common carrier offering.

This too is consistent with pre-1996 Act precedent, which only requires information service providers to break out the transmission component of their service and offer it to others on a common carriage basis where the transmission provider possesses substantial market power. Since the late 1970's, the FCC's so-called "*Computer Rules*" have required certain wireline telephone companies deemed to have market power to separate out and provide indiscriminate access to the transmission component of their information service offerings. *See Amendment of Section 64.702 of the Comm'n's Rules and Regulations*, 77 F.C.C.2d 384, 474-75 (1980) (subsequent history omitted) ("*Computer II*"). In adopting the *Computer Rules*, the Commission found that certain carriers had "bottleneck" control over narrowband transmission facilities under the market conditions that existed in the narrowband market of the 1970's and 1980's. Based upon that finding, the FCC imposed common carrier obligations on a limited class of providers. FCC Pet. 89a-90a n.163. In contrast, the FCC found that carriers that had no control over local bottleneck facilities,

and therefore "d[id] not have . . . market power," would not be in a position to act anticompetitively and need not be subject to the *Computer Rules*. *Computer II*, 77 F.C.C.2d at 468-69.

The plain language of the Communications Act's definitions of "telecommunications service" and "information service" makes clear that these statutory concepts are "mutually exclusive." *Implementation of the Non-Accounting Safeguards of Section 271 and 272 of the Communications Act of 1934, as amended*, 16 F.C.C.R. 9751, 9754-56 (2001). The statutory category of "telecommunications services" constitutes a subset of the many transmission activities (both stand-alone and integrated into larger service offerings) that are treated as "as "telecommunications," but *not* "telecommunications service" under the Act. FCC Pet. 116a (noting that "telecommunications is distinct from telecommunications service").[5]

Under the Act, "telecommunications" involves the transmission "without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). In order to qualify as a "telecommunications *service*," on the other hand, a transmission function must be offered *as a separate service* for a fee to a specified class of users. *Id.* § 153(46) (emphasis added). And the Act separately defines "information service[s]," which involve the offering of "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information," as services provided "*via* telecommunications." *Id.* § 153(20) (emphasis added). This makes clear that an entity offering "information services" is not necessarily *providing* a separate "telecommunications service"

5. *See id.* at 116a n.242 (citing *Federal-State Joint Bd. on Universal Serv.*, 12 F.C.C.R. 8776, 9179-80 (1997)); *Implementation of the Telecomms. Act of 1996; Telecomms. Carriers' Use of Customer Proprietary Network Info. and Other Customer Info.*, 13 F.C.C.R. 8061, 8095-96 (1998).

to its retail subscribers, rather it is *using* telecommunications as part of a larger service offering to the public. *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000); *see Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,521 (1998); S. Rep. No. 104-23, 104th Cong., 1st Sess. 18 (1995); H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 46-47 (1995).

The initial statutory classification of any service under the Communications Act is critical to the regulatory regime that will apply. The classification of a transmission service as a "telecommunications service" means that the service generally will be subject to common carrier treatment and regulation under Title II of the Communications Act, such as price controls through tariffing, service regulation, and a requirement to provide service to any customer that demands it. FCC Pet. 6, 27, 9a.[6] By contrast, providers of "information services" have remained largely unregulated and are free to offer their services on an integrated basis to both retail and wholesale customers on market-based terms. *See id.* at 7, 9a; NCTA Pet. 4.

3. The Commission's Treatment Of Broadband Internet Access Services Prior To Its Issuance Of The Declaratory Ruling

During the early stages of the broadband market's development, the FCC declined to adopt a statutory classification for, or to regulate in any way, the provision of cable modem service. This was due to the Commission's belief that the

6. The FCC does, however, retain the authority to waive any of its rules for "good cause shown," *see* 47 C.F.R. § 1.3, and may forbear from applying any statutory provision or regulation to any telecommunications carrier or telecommunications service if a three-part test is met, *see* 47 U.S.C. § 160(a). As explained below, the existence of this authority does not supply a reason to deny review of the Ninth Circuit's erroneous decision regarding the initial statutory classification of cable modem service. *See infra* pp. 21-23.

dynamic and competitive nature of the broadband market rendered a definitive pronouncement on the issue both unnecessary and premature. *See* FCC Pet. 7-8, 46a; NCTA Pet. 10; *see also Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 352-56 (2002) (Thomas, J., concurring in part, dissenting in part) (describing the FCC's "agnosticism" on the statutory classification question). Thus, cable operators were left free from any regulation, let alone restrictive common carrier rules, in their deployment and provision of broadband Internet access from the mid-1990's to the present. In 2002, this Court stated that it could not "fault" the FCC for leaving for another day the "hard" question of cable modem service's regulatory classification, one this Court acknowledged involved "technical, complex, and dynamic" subject matter. *Gulf Power*, 534 U.S. at 339. *But see id.* at 360-61 (Thomas, J., concurring in part, dissenting in part) (chiding the Commission and the Court for leaving the question of proper statutory classification open despite its centrality to proper application of the Communications Act).

On the other hand, during that same time period, the Commission imposed the legacy common carrier obligations applicable to voice telephony on the transmission component of DSL service provided by wireline telephone companies. *See Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 14 F.C.C.R. 19,237, 19,247 (1999); *GTE Tel. Operating Cos.*, 13 F.C.C.R. 22,466, 22,483 (1998). It did so reflexively, in cursory tariff proceedings, based only on the identity of the provider. The extension of common carrier treatment to DSL was not supported by any analysis – let alone a careful examination of the statutory definitions at issue, the relevant market conditions, the incentives to make capital investments and deploy facilities, and the relative costs and benefits of common carrier regulation. The FCC engaged in such a thorough analysis for the first time in the order at issue in this case.

At least in part because it enjoyed a substantial regulatory advantage, cable modem service grew to become the clear leader in the broadband market. For the last several years, cable has consistently maintained a broadband market share of fifty-eight to sixty-five percent. FCC, Indus. Analysis & Tech. Div., *High-Speed Servs. for Internet Access: Status as of Dec. 31, 2003*, at 6 (Table 1) (June 2004), *at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606, 1643 (2004).

B. The Proceedings Below

1. The FCC's Declaratory Ruling

In 2000, the FCC set out to "develop a national legal and policy framework" to govern broadband Internet access services and released the Notice of Inquiry that resulted in the order at issue. *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 F.C.C.R. 19,287, 19,288 (2000). In its Notice of Inquiry, the Commission asked for comments regarding the interrelationship between the statutory classification of cable modem service and other broadband technologies, including DSL. *Id.* at 19,293.

After reviewing a comprehensive record containing hundreds of submissions from interested parties, and following a detailed examination of the statute that it is tasked by Congress with administering and its own prior precedent, the FCC issued the declaratory ruling at issue in this case. *See* FCC Pet. 40a-188a. The Commission made three critical findings with respect to the proper statutory classification and regulatory treatment of cable modem service.

First, the FCC found that, in light of its consistent conclusion that the broadband market constitutes a separate and

vibrantly competitive product market, there is no basis for compelling cable operators to carve out the transmission component that underlies cable modem service and offer it on a common carrier basis. *Id.* at 98a-102a. Thus, the Commission classified the combined Internet access service offering of cable operators as an "information service," *id.* at 88a-98a, and the underlying transmission component of that service as non-common carriage "telecommunications" under the Act, *id.* at 100a-102a.

Second, the FCC found that where cable operators might be offering broadband transmission service separately to other Internet service providers there was no reason to compel the offering of such service on a common carrier basis. *See id.* at 104a-114a. Thus, the Commission stated that it would allow cable operators to continue to provide transmission service on a non-common carrier, or "private carrier," basis (*e.g.*, as a form of "telecommunications" but not "telecommunications service"). *See id.*

Third, the FCC waived any application of its *Computer Rules* to cable modem service. As discussed above, these rules otherwise would require the transmission component of cable modem service to be offered on a common carriage basis if that transmission component were classified as a "telecommunications service." FCC Pet. 102a-104a. The Commission initiated a further rulemaking proceeding to determine whether to forbear from applying other common carrier requirements to the transmission component of cable modem service if they might otherwise apply. *Id.* at 151a-153a.

The FCC has since commenced, but not completed, proceedings to determine the appropriate regulatory framework that will apply to cable's broadband competitors, including wireline broadband services and powerline broadband services. *See generally Inquiry Regarding Carrier Current Sys., including*

Broadband over Power Line Sys., 18 F.C.C.R. 8498 (2003); *Wireline Broadband NPRM*, 17 F.C.C.R. 3019. The FCC has repeatedly found, both before and after issuance of the order under review, that competition in the broadband market has only continued to grow over time. *See, e.g.*, *Fourth Section 706 Report*, at 8, 13, 14-23; *Wireline Broadband NPRM*, 17 F.C.C.R. at 3022. The federal courts, too, have confirmed that "robust competition" exists in the "broadband market." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"); *see United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir. 2004) ("*USTA II*"). The Commission has also reaffirmed the need to encourage investment and deployment through a uniform national broadband policy. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3023.

2. The Ninth Circuit's *Per Curiam* Opinion

Seven different petitions for review of the FCC's decision were filed in the Third, Ninth, and D.C. Circuits pursuant to the Hobbs Act, 28 U.S.C. § 2341, *et seq*. *See* FCC Pet. 10a. For its part, Verizon, which offers wireline broadband service in direct competition with cable modem service, argued that the Commission correctly concluded that cable modem service is an "information service" and that its underlying transmission component is "telecommunications." At the same time, Verizon maintained that the FCC should have resolved questions related to the regulatory classification of the broadband services provided by both cable and wireline operators in its declaratory ruling. *See id.* at 10a-11a. Additional parties raised a variety of other challenges to the Commission's decision. *See id.* at 10a. The petitions were consolidated in the Ninth Circuit under the lottery provisions of 28 U.S.C. § 2112(a)(3). *See* FCC Pet. 11a.

The Ninth Circuit, in a *per curiam* decision, vacated the FCC's determination that cable modem service is an "information service" that does not include a separately regulated

"telecommunications service." *Id.* at 21a-22a. The panel did so not because it disagreed with the Commission's statutory analysis, but because it concluded that it was bound by a Ninth Circuit panel decision which pre-dated any formal FCC decision on the subject. *Id.* at 12a-22a. In that case, *AT&T Corp. v. City of Portland*, a different panel of the Ninth Circuit had held that because cable modem service sold to end users is provided via a transmission component – "telecommunications" under the Communications Act – and because cable modem service is offered to the public, cable modem service *ipso facto* contains a separate "telecommunications service." Thus, the *Portland* panel declared that, absent a forbearance ruling from the FCC, cable modem service *must be subjected* to the full panoply of common carrier obligations under Title II of the Communications Act. *See* Resp. 12a.

The *Portland* panel reached this conclusion despite the fact that other questions were dispositive of the controversy before it, *see* NCTA Pet. 6-7, and notwithstanding the pendency of an FCC proceeding directed at addressing the classification of cable modem service (which the Commission expressly pointed out in its *amicus* brief asking the court to resolve only the narrow question necessary to end the dispute), *see* FCC Pet. 8-9. The panel in *Portland* did not examine the statutory interrelationship and distinctions among "telecommunications," "telecommunications services," and "information services." Nor did it consider the proper market definition, the presence of intensive competition in the broadband market, or the decades of Commission and judicial precedent making clear that common carrier duties cannot be imposed unless the public interest requires them due to competitive conditions. *See supra* pp. 7-9. In addition, the *Portland* panel relied to a large extent on the Commission's treatment of DSL service offered by wireline providers as a "telecommunications service subject to common carrier obligations" in reaching its decision. Resp. 16a. Finally, the *Portland* panel acknowledged that the FCC had yet

to speak to the statutory classification issue and had open administrative proceedings in which it intended to do so. *See id.* at 8a.

The *Portland* panel conceded that "courts are ill-suited to fix [the] flow" of the Internet, and that the "quicksilver technological environment" in which broadband services exist would render it an "idle exercise" for a court even to attempt to establish a national policy on this subject. *Id.* at 8a. Notwithstanding these statements, three years later, the panel in *Brand X* held itself to be bound by *Portland*. FCC Pet. 12a-22a. The *Brand X* panel reached this conclusion even though the petitions for review before it involved an FCC decision interpreting the agency's own organic mandate after a comprehensive examination of the structure and operation of the statutory definitions in the Act and the workings of the broadband market.

In so doing, the *Brand X* decision perpetuated the unsupported statutory syllogism upon which the *Portland* panel had relied: (1) "Internet access for most [end] users consists of two separate services," Resp. at 11a; (2) one component of this service constitutes "*telecommunications*" as defined in 47 U.S.C. § 153(43), Resp. at 11a (emphasis added); and (3) therefore, "to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a *telecommunications service* as defined in the Communications Act," *id.* at 12a (emphasis added).

The *Brand X* panel also extended the *Portland* panel's rote reliance on the Commission's prior treatment of DSL services. Indeed, the concurring opinion of Judge Thomas (the author of *Portland*) in *Brand X* makes clear that the FCC's treatment of DSL formed a central part of the *Portland* panel's reasoning and, thus, was integral to the *Brand X* decision. *See* FCC Pet. 31a-32a (Thomas, J., concurring) (explaining prior FCC treatment of "Internet access via DSL" and concluding that the

FCC's approach to DSL "reflects a much more reasonable reading of the statute").

Because it held that *Portland* was dispositive, the *Brand X* panel completely ignored the Commission's findings regarding the competitive state of the broadband market and the lack of any need for common carrier regulation. Nor did the *Brand X* panel consider the fact that the Commission's early decisions treating DSL services as "telecommunications services" did not result from the FCC's careful analysis of the competitive state of the broadband market but, rather, from the mechanical extension of the regulatory regime that historically applied to telephone companies in the separate market for traditional telephone service. In fact, the Commission has explicitly indicated that it is re-examining the proper statutory and regulatory framework for *all broadband services* regardless of the technology used or the corporate identity of the provider. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3037-38, 3040-41. The *Brand X* panel was well aware that the agency was reconsidering its treatment of all broadband transmission platforms, *see* FCC Pet. at 9a n.9 (citing *Wireline Broadband NPRM*, 17 F.C.C.R. 3019); *id.* at 32a n.2 (Thomas, J., concurring) (same); *see also id.* at 46a n.36 (same), yet the panel majority purported to bind the agency to a statutory interpretation that rendered this reexamination significantly more difficult. In sum, the *Brand X* panel adopted, without any independent analysis, the *Portland* decision's finding that cable modem service sold to end users includes a separate "telecommunications service" subject to common carrier regulation. FCC Pet. 21a-22a.[7]

7. The panel left intact the FCC's determination that transmission services could be offered on a "private carriage" basis to Internet service providers, and did not purport to disturb the Commission's decision to waive the application of the *Computer Rules* to cable modem service or the FCC's power to forbear from applying common carrier requirements in its ongoing rulemaking. *See id.* at 22a n.14; *see also id.* at 34a-35a (Thomas, J., concurring).

REASONS FOR GRANTING THE PETITIONS

The Ninth Circuit's earlier decision in *Portland*, and by extension the decision in *Brand X*, fundamentally misapplied the definitions in the Communications Act and incorrectly concluded that cable modem service sold to end users must initially be classified as a "telecommunications service." The court of appeals adopted this course in the face of a carefully reasoned agency decision that faithfully applied FCC and judicial precedent to arrive at a contrary conclusion. The Ninth Circuit did not find that agency discretion was constrained by an unambiguous expression of congressional will regarding the question at issue but, rather, elevated its own will, contained in a prior circuit opinion, above that of the agency. Irrespective of whether the *Brand X* panel correctly determined that it was bound by *stare decisis* to follow the previous decision in *Portland*, *see* FCC Pet. 19-23; NCTA Pet. 19-29, both decisions incorrectly apply the statutory definitions contained in the Act. This result has injected significant uncertainty with respect to the proper classification of *all* broadband services, thereby undermining investment incentives and discouraging innovation in this burgeoning market in contravention of clearly expressed national policy. It has prevented the Commission from establishing a uniform, national regulatory regime for all broadband providers, regardless of the corporate identity of the provider or the technology used. The intervention of this Court is necessary to correct the errors of statutory construction and the deviation from proper judicial review begun in *Portland* and perpetuated and exacerbated by *Brand X*.

A. The Classification Of Broadband Internet Access Service Under The Communications Act Presents An Issue Of Exceptional National Importance.

Encouraging deployment of and investment in broadband facilities has been among the nation's primary communications policy goals since before the 1996 Act. In furtherance of this

goal, and recognizing that unnecessary regulation impedes investment in new technologies, Congress expressly directed that the broadband market should be permitted to develop in an environment largely marked with "a minimum of government regulation." 47 U.S.C. § 230(a)(4); *see id.* § 230(b)(2); 1996 Act § 706; FCC Pet. 3-5, 24-25, 46a, 47a; NCTA Pet. 17-19.

The Communications Act commands that its service definitions be applied in a technologically neutral manner. Section 706 of the 1996 Act requires the Commission to encourage broadband deployment "without regard to any transmission media or technology." 1996 Act, § 706(c)(1). The Act's definition of a "telecommunications service" similarly makes clear that a service is defined as such "regardless of the facilities used." 47 U.S.C. § 153(46); *see* Resp. 16a; *see also* FCC Pet. 90a.

Unfortunately, through historical accident, the present regulatory regime for broadband services flouts rather than respects these principles of technological and competitive neutrality. Cable operators, unlike their wireline competitors, historically have been free from any regulation whatsoever in their provision of broadband Internet access services and, thus, grew to become – and have remained – the clear leaders in the market. *See supra* pp. 11-12. In recognition of competitive developments in the broadband market, the Communications Act's requirement of technological neutrality, and the disincentives to invest occasioned by common carrier regulation, the Commission has commenced proceedings aimed at developing a uniform national broadband policy and lifting regulatory burdens on broadband providers where they otherwise currently apply. *See supra* pp. 13-14. The Ninth Circuit's decision, if allowed to stand, will result in substantial uncertainty with respect to the FCC's ability to achieve its desired goals, thereby threatening broadband deployment and investment across all platforms.

Imposing burdensome regulation on *any* provider in the competitive broadband market, as the *Brand X* decision purports to require in the case of cable modem service, would be entirely at odds with the express congressional policy that the Internet continue to develop "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); *see* 1996 Act § 706(b); *see also* S. Conf. Rep. No. 104-230, at 1 (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (Joint Explanatory Statement); *S.W. Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997). Such regulation also would create uncertainty for other broadband providers and would blunt incentives to invest in broadband technologies because, as has been widely recognized, common carrier regulations discourage companies from allocating financial and other resources to new technologies. By directing the FCC to "utilize[e] . . . regulatory forbearance" to encourage broadband deployment, Congress made clear its belief that unnecessary regulatory burdens are affirmatively counterproductive in terms of promoting new investment. 1996 Act, § 706(a).

As the FCC rightly points out, common carrier obligations could lead carriers to "raise their prices and postpone or forego plans to deploy new broadband infrastructure." FCC Pet. 26; *see* NCTA Pet. 19 ("[The] outcome [compelled by *Brand X*] may stifle investment in broadband infrastructure, innovation, and deployment.").[8] On the other hand, certainty that broadband

8. The Commission has repeatedly affirmed this principle. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3042-43 (noting that minimal regulatory environment is necessary to "encourage market participants to deploy broadband networks more expeditiously and increase facilities-based competition"); *see also VOIP NPRM*, 19 F.C.C.R. at 4864 (noting that the Internet developed into one of the greatest advances in communications technology because it has been "free of many of the regulatory obligations applied to traditional telecommunications services and networks").

networks will remain free from common carrier regulations would result in strong investment incentives so that, in the end, "consumers will benefit from th[e] race to build next generation networks and the increased competition in the delivery of broadband services." *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,141 (2003); *see USTA II*. 359 F.3d at 584.[9]

It is no answer to say that the FCC potentially could remove common carrier regulations through the alternative paths left open by *Brand X*, either by classifying the underlying transmission service as "private carriage" or by waiving or forbearing from any common carrier regulations that might otherwise apply.[10] Neither of these possible eventualities, even assuming that it ultimately were to occur, can substitute for the authority Congress clearly conferred upon the FCC to determine whether broadband transmission facilities should be classified as common carrier facilities in the first place.

First, the classification of a service is the *threshold* issue under the Communications Act and, absent further action by the FCC, dictates specific regulatory treatment. *See supra* p. 10; FCC Pet. 6, 27, 9a. Congress delegated the authority to

9. *See also Computer II*, 77 F.C.C.2d at 387 ("the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network").

10. *See* FCC Pet. 22a n.14 (declining "to consider the [parties'] remaining claims (including those directed at the validity of the FCC's determination that [some cable operators] offer[] cable transmission to unaffiliated ISPs on a private carriage basis and its waiver of the *Computer II* requirements for cable companies who also offer local exchange service")); *id.* at 34a-35a (Thomas, J., concurring) ("Naturally, the FCC may choose to forbear from enforcing these regulations.").

the Commission to initially determine how services are classified under the Act and thus how they are regulated. *See* Resp. 17a; FCC Pet. 11a. The Commission's expertise is critical in this area, because questions relating to how Internet services, including those provided by cable operators, should be treated under the Act present "hard questions," *Gulf Power*, 534 U.S. at 338, in an area that is "technical, complex, and dynamic," *id.* at 339.

The court below purported to "beat the FCC to the punch" as to the proper classification of cable modem service, leading to what Judge O'Scannlain accurately characterized as an exceedingly "strange result": "three judges telling an agency acting within the area of its expertise that its interpretation of the statute it is charged with administering cannot stand – and that [their] interpretation . . . is the correct . . . interpretation." FCC Pet. 24a-25a (O'Scannlain, J., concurring); *see id.* at 25a n.18 (citing *United States v. Mead Corp.*, 533 U.S. 218, 246 (2001) (Scalia, J., dissenting)). By prohibiting the Commission from taking the most direct – and the statutorily prescribed – route to determining the proper regulatory treatment of broadband services, the Ninth Circuit's decision turns the statutory structure on its head. The statutory default becomes common carrier treatment, and the Commission can correct this error only through indirect and circuitous statutory proceedings that should be unnecessary. An erroneous statutory ruling by a court of appeals cannot escape review because it is *possible* that the agency may be able to fashion a means to accomplish in a more complicated and indirect fashion what Congress gave it authority to achieve immediately and directly.

Second, it is likely that the question whether "private carriage" classification or forbearance is appropriate would be hotly contested and ultimately challenged in court, causing delay and perpetuating uncertainty. *See id.* at 28. One need look no farther than the procedural history of this case itself to predict that, regardless of the result, the FCC's conclusions would be

the subject of significant controversy and appellate review. The resulting delay would only worsen the uncertainty that has already plagued the broadband industry, a result that "itself may discourage investment and innovation," *id.* at 28, 47a, and thus directly contravenes our nation's telecommunications policy goal of promoting broadband deployment.

Today broadband competition stands at a crossroads: cable operators continue to enjoy nearly a two-thirds share of the residential market, but wireline providers remain formidable competitors and new technologies are on the horizon. *See supra* p. 12. And broadband providers, including Verizon, are beginning to construct the next generation of broadband networks that will be capable of delivering faster speeds, innovative services, and increased reliability at lower costs. But widespread deployment of second-generation broadband networks requires significant amounts of up-front capital to be placed at competitive and technological risk. Impeding investment in broadband at this critical time by requiring businesses to labor under a cloud of legal and regulatory uncertainty threatens to have lasting adverse effects on the deployment of new infrastructure.

B. The Panel Decision Below Is Inconsistent With The Terms Of The Communications Act And Conflicts With A Significant Body Of Precedent.

The *Portland* panel's conclusion that the transmission component of cable modem service sold to end users is a "telecommunications service," which was adopted without analysis by the *Brand X* panel, directly contravenes the terms of the Communications Act. As explained above, the Act defines two distinct categories of activities that involve the "transmission" of information. The first of those, "telecommunications," includes any "transmission"

of information without change in the form or content of that information. 47 U.S.C. § 153(43). The second, "telecommunications services," is a subset of the first, and includes only "telecommunications" that are offered on common carrier terms. *See id.* §§ 153(46), 153(44). The Act also defines a third category of activities, "information services," which by definition are made available "via telecommunications," *id.* § 153(20), but that does not, contrary to the Ninth Circuit's apparent view, render them part "telecommunications services" under the Communications Act.[11]

Indeed, if the Ninth Circuit were correct that cable modem service includes a separate "telecommunications service" simply because it includes a transmission function that is ultimately offered "to the public," *see* Resp. 11a, then there would have been no reason for Congress to have included a separate definition of "telecommunications" in the Communications Act or to have specified that "information services" are made available "via telecommunications," *see, e.g.*, *United States v. Bean*, 537 U.S. 71, 75 n.4 (2002) ("The use of different words within related statutes generally implies that different meanings were intended." (quoting 2A N. Singer, Sutherland on Statutes and Statutory Construction § 46.06, p. 194 (6th ed. 2000))). At the end of the day, almost every communications service

11. Whatever the validity of the *Brand X* panel's determination that it was bound by *Portland*, *see* FCC Pet. 11a-21a, this Court obviously is not so bound and may review the FCC's decision under the familiar two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). *See* NCTA Pet. 21 & n.10. Indeed, in *Chevron* itself this Court reversed the decision of a court of appeals despite the fact that the court of appeals had followed its own precedent in setting aside the agency decision at issue. *Chevron*, 467 U.S. at 841-45; *see, e.g.*, *Muhammed v. Close*, 540 U.S. 749, 124 S. Ct. 1303, 1306 (2004) (*per curiam*) (criticizing court of appeals for "following the mistaken view expressed in [c]ircuit precedent").

includes some element of "transmission," either because it provides only a transmission function or because a transmission function is an integral part of a larger service package. Under the express definitions in the Act, however, that does not mean that the transmission element necessarily qualifies as a "telecommunications service," regardless of whether the transmission element is offered on a stand-alone basis or, as in this case, as part of a larger service package offered to the public. As a matter of statutory construction, the Ninth Circuit's view makes no sense at all.

The Ninth Circuit's decision that cable modem service includes a separate "telecommunications service" just because it includes a "transmission" component also conflicts with a substantial body of judicial and FCC precedent. In fact, neither the question whether common carrier treatment should be imposed on a service that involves transmission, nor the question whether a carrier should be compelled to offer the transmission component of an integrated service separately, depends on whether a service offered to the public involves an element of "transmission." Congress would have been aware of this pre-existing body of precedent at the time it passed the 1996 Act, yet did nothing to change that state of affairs. On the contrary, as explained above, Congress included definitions in the 1996 Act that are fully consistent with, and reinforce, this precedent.

Specifically, under a long line of Commission and judicial precedent consistently applied both before and after the 1996 Act, in the absence of a voluntary undertaking to offer the transmission component of a service on common carrier terms, the decision to impose common carrier treatment depends on whether "the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently" because the carrier "has sufficient market power." *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21,585, 21,588-89 (1998); *see Cable & Wireless, PLC*, 12 F.C.C.R. at 8521-22; *Virgin Islands Tel.*, 198 F.3d at 924-25; *NARUC I*, 525 F.2d at 642. Absent a unilateral decision

to serve all customers indifferently, classification of a service as a "telecommunications service" – and imposition of attendant common carrier obligations – must be based upon a finding of market power. *See, e.g.*, *AT&T Submarine Sys.*, 13 F.C.C.R. at 21,589; *see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21,905, 21,957 (1996) (declining to impose Title II regulation because the relevant market was "highly competitive").

The Ninth Circuit's finding that cable modem service is partially a "telecommunications service" under the Communications Act just because it includes a "transmission" component, Resp. 12a, stands in direct conflict with the D.C. Circuit's ruling in *Virgin Islands Telephone*. In that case, the D.C. Circuit concluded that the 1996 Act *did not* change the Commission's historical market-based analysis of the question whether an entity provides a common carrier "telecommunications service" under the Communications Act. *See Virgin Islands Tel.*, 198 F.3d at 926-27. It expressly rejected the argument that the new definition of "telecommunications service" in the 1996 Act bound the FCC to exactly the kind of wooden analysis prescribed by the Ninth Circuit in *Portland* and *Brand X*. *See Virgin Islands Tel.*, 198 F.3d at 925, 927 (rejecting argument that the definition of "telecommunications service" in the 1996 Act is "a new statutory standard that effects a drastic change in the regulatory regime") (footnote omitted).

Similarly, under the body of precedent that pre-dates the 1996 Act, the question whether the underlying transmission component of an integrated service offering must be stripped out and offered on a stand-alone basis depends upon the competitive state of the market. Although many communications

services include a transmission component, the general rule is that providers *need not* separate out the transmission component of a service offering and offer it on common carrier terms. Such a requirement has consistently been imposed only where a carrier or class of carriers enjoys "bottleneck" control over transmission facilities. FCC Pet. 90a n.163; *see id.* at 101a. The FCC has consistently, and rightly, declined to compel carriers to carve out and offer separately transmission services where they "d[id] not have market power" and thus would not be in a position to act anticompetitively. *Computer II*, 77 F.C.C.2d at 468-69. Even the Ninth Circuit, well before the decision in *Portland*, had confirmed the correctness of this approach. *See California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994); *California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990).

The FCC correctly found in the *Declaratory Ruling* that the competitive nature of the broadband market eliminated any public interest reason to impose common carrier duties. The broadband Internet access market is vibrantly competitive and is only growing more so with each passing day. *See, e.g.*, *USTA II*, 359 F.3d at 585; *USTA I*, 290 F.3d at 428. Indeed, the Commission long ago confirmed that "no group of firms or technology will likely be able to dominate the provision of broadband services, " *Rulemaking to Amend Parts 1, 2, 21, and 25*, 15 F.C.C.R. 11,857, 11,865 (2000), and that "the preconditions for monopoly appear absent" in the separate broadband market, *Inquiry Concerning the Deployment of Advanced Telecomms. Capability to All Ams. in a Reasonable and Timely Fashion*, 14 F.C.C.R. 2398, 2423-24 (1999). Thus, the Commission's decision not to separate out and impose common carrier treatment on the transmission component of cable modem service was amply supported by, and, indeed,

compelled by, the competitive state of the broadband market.[12] These same market characteristics fully justified, and, indeed, required, the FCC's decision not to perform what the Commission accurately termed "radical surgery" by requiring broadband providers to offer separately the transmission component of integrated Internet access services on common carrier terms. FCC Pet. 101a. The Ninth Circuit, on the other hand, completely ignored the competitive state of the broadband market. Its ruling thus stands in direct conflict with a substantial body of Commission and judicial precedent.

In sum, the panel decision in *Portland*, and by extension *Brand X*, fundamentally misapplied the Communications Act's statutory definitions and disregarded decades of precedent and the competitive realities of the broadband market. Absent this Court's review, the Ninth Circuit's decision will prevent the FCC from taking immediate and direct steps to "remove barriers to infrastructure investment" in order to encourage widespread broadband deployment, despite Congress' command that it do

12. The FCC's decision in this regard was also consistent with a long line of precedent refusing to impose common carrier duties on pure transmission functions in competitive markets. *See, e.g., Licensing Under Title III of the Communications Act of 1934, as amended*, 8 F.C.C.R. 1387, 1388-91 (1993) (declining to impose common carrier duties on satellite services including mobile voice, data, and facsimile because carrier did not have "sufficient market power"); *Cox Cable Communications, Inc.*, 102 F.C.C.2d 110, 121-22 (1985) (declining to impose common carrier duties on high-speed digital transmission services on a carrier that "ha[d] little or no market power" and where "[t]here [we]re alternative methods of providing similar service"); *accord Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 207, 208 (D.C. Cir. 1982) (upholding Title I classification of enhanced services and customer premises equipment ("CPE") because "the market for enhanced services is 'truly competitive'" and "charges for CPE provided by carriers need no longer be regulated . . . because of the competitive market conditions now prevailing").

just that, 1996 Act, §§ 706(a), (b), and will relegate the Commission's reform efforts to the more cumbersome, indirect process of attempting to create a uniform national broadband policy by creating exceptions to generally applicable rules.

CONCLUSION

For the forgoing reasons, the Petitions for Writs of Certiorari should be granted.

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED JUNE 22, 2000

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 99-35609

AT&T CORPORATION; TCI Cablevision of Oregon, Incorporated; TCI of Southern Washington,

Plaintiffs-Appellants,

and

Tele-Communications, Inc.,

Plaintiff,

and

US West Interprise America, Inc.; Oregon Internet Service Provider Association; OGC Telecomm, Ltd., dba Integra Telecom,

Intervenors,

v.

CITY OF PORTLAND; Multnomah County,

Defendants-Appellees,

GTE Internetworking, Inc.,

Intervenor.

Argued and Submitted Nov. 1, 1999
Filed June 22, 2000

Appendix A

Before: LEAVY, FERNANDEZ, and THOMAS, *Circuit Judges.*

THOMAS, Circuit Judge:

This appeal presents the question of whether a local cable franchising authority may condition a transfer of a cable franchise upon the cable operator's grant of unrestricted access to its cable broadband transmission facilities for Internet service providers other than the operator's proprietary service. We conclude that the Communications Act prohibits a franchising authority from doing so and reverse the judgment of the district court.

I

Distilled to its essence, this is a struggle for control over access to cable broadband technology. In broadband data transmission, a single medium carries multiple communications at high transmission speeds. The allure of broadband technology is that it allows users to access the Internet at speeds fifty to several hundred times faster than those available through conventional computer modems connected to what is commonly referenced in the telecommunications industry as "plain old telephone service." Broadband allows transmission, or "streaming," of live video and audio communications, as well as video and audio data files. To satisfy consumer demand for broadband Internet access, cable television operators have replaced coaxial wires with fiber-optic cable, telephone companies have initiated high-frequency digital subscriber line ("DSL") services over standard twisted-pair copper wires, fixed wireless providers

Appendix A

have upgraded their microwave transmission capacities, satellite providers have launched global two-way digital networks, and researchers have explored the use of quantum communication methods.

The race to acquire broadband transmission systems has, in part, prompted a number of corporate mergers. This appeal concerns the merger between AT & T, at the time the nation's largest long distance telephone provider, and Telecommunications, Inc. ("TCI"), one of the nation's largest cable television operators. In addition to providing traditional cable television programming, TCI provided cable broadband Internet access to consumers in certain geographic areas. Since acquiring TCI, AT & T has continued to offer cable broadband access as part of its "@Home" service, which bundles its cable conduit with Excite, an Internet service provider ("ISP") under an exclusive contract. Like many other ISPs, @Home supplements its Internet access with user e-mail accounts and a Web portal site, a default home page gateway offering Internet search capabilities and proprietary content devoted to chat groups, interactive gaming, shopping, finance, news, and other topics. @Home subscribers also may "click-through" to other free Web portal sites, and may access other Internet service providers if they are willing to pay for an additional ISP; however, subscribers cannot purchase cable broadband access separately from an unaffiliated ISP, and have no choice over terms of Internet service such as content and bandwidth restrictions.

The @Home cable broadband infrastructure differs from that of most ISPs. A typical ISP connects with the Internet via leased telecommunications lines, which its consumers

access through "dial-up" connections over ordinary telephone lines. @Home operates a proprietary national "backbone," a high-speed network parallel to the networks carrying most Internet traffic, which connects to those other Internet conduits at multiple network access points. This backbone serves regional data hubs which manage the network and deliver Excite's online content and services, including multimedia content that exploits broadband transmission speeds. Each hub connects to local "headend" facilities, cable system transmission plants that receive and deliver programming, where "proxy" servers cache frequently requested Internet data, such as Web sites, for local delivery. Each headend connects to cable nodes in neighborhoods, each of which in turn connects via coaxial cable to the user's cable modem and computer.

To effect the merger, AT & T and TCI sought three types of regulatory approval. The Department of Justice approved the merger on antitrust grounds, subject to TCI's divestiture of its interest in Sprint PCS wireless services. *See United States v. AT & T Corp., Tele-Communications, Inc.*, No. CIV. 98 CV03170, 1999 WL 1211462 (D.D.C. Aug. 23, 1999) (final judgment). The Federal Communications Commission ("FCC") approved the transfer of federal licenses from TCI to AT & T, after addressing public interest concerns in four service areas, including residential Internet access. *See Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from TCI to AT & T*, 14 F.C.C.R. 3160, 1999 WL 76930 (1999) ("*Transfer Order*").

One of the issues that the FCC considered forms the undercurrent of the present controversy: whether to impose

a requirement of open access to cable broadband facilities. A variety of interest groups and competitors argued that allowing AT & T to restrict cable broadband access to the proprietary @Home service would harm competition and reduce consumer choice. In its order approving the license transfer, the FCC rejected any open access condition, citing the emergence of competing methods of high-speed Internet access, and @Home customers' "ability to access the Internet content or portal of his or her choice." It found "that the equal access issues raised by parties to this proceeding do not provide a basis for conditioning, denying, or designating for hearing any of the requested transfers of licenses and authorizations." *Transfer Order* at ¶ 96. The FCC concluded that "while the merger is unlikely to yield anti-competitive effects, we believe it may yield public interest benefits to consumers in the form of a quicker roll-out of high-speed Internet access services." *Transfer Order* at ¶ 94.

The last regulatory hurdle that AT & T and TCI faced was the approval of local franchising authorities where required by local franchising agreements. *See* 47 U.S.C. § 537 (permitting franchising authority approval of cable system sales when the franchise agreement so requires). TCI's franchises with Portland and Multnomah County (collectively, "Portland") permitted the city to "condition any Transfer upon such conditions, related to the technical, legal, and financial qualifications of the prospective party to perform according to the terms of the Franchise, as it deems appropriate." This language parallels the text of 47 U.S.C. § 541(a)(4)(C), which describes the conditions a locality may impose on a franchise.

Portland referred the transfer application for recommendation by the Mount Hood Cable Regulatory Commission, an intergovernmental agency overseeing cable affairs in the Portland region. In response to Portland's preliminary questions, AT & T confirmed that TCI was in the process of upgrading its cable system to support @Home over cable broadband, and maintained that @Home was a proprietary product "not subject to common carrier obligations." At public hearings, the incumbent local telephone exchange carrier U.S. WEST and the Oregon Internet Service Providers Association called for open access to TCI's cable broadband network, citing-in addition to consumer welfare-the need for "a level playing field" with U.S. WEST's common carrier obligations and a "very real potential that consumer [Internet] access businesses could go out of business." The Mount Hood Commission recommended that the city and county approve the transfer of franchise control subject to an open access requirement.

On December 17, 1998, Portland and Multnomah County voted to approve the transfer, subject to an open access condition expressed in a written acceptance:

> *Non-discriminatory access to cable modem platform.* Transferee shall provide, and cause the Franchisees to provide, non-discriminatory access to the Franchisees' cable modem platform for providers of Internet and on-line services, whether or not such providers are affiliated with the Transferee or the Franchisees, unless otherwise required by applicable law. So long as cable modem services are deemed to be "cable

> services," as provided under Title VI of the Communications Act of 1934, as amended, Transferee and the Franchisees shall comply with all requirements regarding such services, including but not limited to, the inclusion of revenues from cable modem services and access within the gross revenues of the Franchisees' cable franchises, and commercial leased access requirements.

AT & T refused the condition, which resulted in a denial of the request to transfer the franchises. AT & T then brought this action, seeking-declarations that the open access condition violated the Communications Act of 1934, as amended by the Telecommunications Act of 1996, Pub.L. No. 104-104, 110 Stat. 56 (1996), codified at 47 U.S.C. § 151, *et seq.* (collectively, the "Communications Act"), the franchise agreements, and the Constitution's Commerce Clause, Contract Clause, and First Amendment. The district court rejected all of AT & T's claims and granted summary judgment to Portland. *See AT & T Corp. v. City of Portland*, 43 F.Supp.2d 1146 (D.Or.1999). We review de novo a grant of summary judgment; there being no disputed factual issues, we face only a question of statutory interpretation. *See Fort Belknap Indian Community v. Mazurek*, 43 F.3d 428, 432 (9th Cir.1994).

II

The parties, and numerous amici, forcefully urge us to consider what our national policy should be concerning open access to the Internet. However, that is not our task, and in

our quicksilver technological environment it doubtless would be an idle exercise. The history of the Internet is a chronicle of innovation by improvisation, from its genesis as a national defense research network, to a medium of academic exchange, to a hacker cyber-subculture, to the commercial engine for the so-called "New Economy." Like Heraclitus at the river, we address the Internet aware that courts are ill-suited to fix its flow; instead, we draw our bearings from the legal landscape, and chart a course by the law's words. To that end, "we look first to the plain language of the statute, construing the provisions of the entire law, including its object and policy." *United States v. Mohrbacher*, 182 F.3d 1041, 1048 (9th Cir.1999) (citation omitted). We note at the outset that the FCC has declined, both in its regulatory capacity and as amicus curiae, to address the issue before us. Thus, we are not presented with a case involving potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine. *See Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 120 S.Ct. 1291, 1300-01, 146 L.Ed.2d 121 (2000).

A

Because Portland premised its open access condition on its position that @Home is a "cable service" governed by the franchise, we begin with the question of whether the @Home service truly is a "cable service" as Congress defined it in the Communications Act. We conclude that it is not.

Subject to limited exceptions, the Communications Act provides that "a cable operator may not provide cable service without a franchise." 47 U.S.C. § 541(b)(1). The Act defines

"cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 522(6). For the purposes of this definition, "video programming" means "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and "other programming service" means "information that a cable operator makes available to all subscribers generally." 47 U.S.C. § 522(14). The essence of cable service, therefore, is one-way transmission of programming to subscribers generally.

This definition does not fit @Home. Internet access is not one-way and general, but interactive and individual beyond the "subscriber interaction" contemplated by the statute. Accessing Web pages, navigating the Web's hypertext links, corresponding via e-mail, and participating in live chat groups involve two-way communication and information exchange unmatched by the act of electing to receive a one-way transmission of cable or pay-per-view television programming. And unlike transmission of a cable television signal, communication with a Web site involves a series of connections involving two-way information exchange and storage, even when a user views seemingly static content. Thus, the communication concepts are distinct in both a practical and a technical sense. Surfing cable channels is one thing; surfing the Internet over a cable broadband connection is quite another.

Further, applying the carefully tailored scheme of cable television regulation to cable broadband Internet access would lead to absurd results, inconsistent with the statutory structure. For example, cable operators like AT & T may be required by a franchising authority to set aside cable channels for public, educational or governmental use, *see* 47 U.S.C. § 531, must designate some of their channels for commercial use by persons unaffiliated with the operator, *see* 47 U.S.C. § 532, and must carry the signals of local commercial and non-commercial educational television stations, *see* 47 U.S.C. § § 534 & 535. We cannot rationally apply these cable television regulations to a non-broadcast interactive medium such as the Internet. As our sister circuit concluded in the context of the abortive "video dialtone" common carrier television technology, regulating @Home as a cable service "simply makes no sense in any respect, and would be infeasible in many respects." *National Cable Television Ass'n. v. FCC*, 33 F.3d 66, 75 (D.C.Cir.1994).

Thus, because the Internet services AT & T provides through @Home cable modem access are not "cable services" under the Communications Act, Portland may not directly regulate them through its franchising authority.

B

Although we conclude that a cable operator may provide cable broadband Internet access without a cable service franchise, we must also determine whether Portland may condition AT & T's provision of standard cable service upon its opening access to the cable broadband network for competing ISPs. To do so, we must determine how the Communications Act defines @Home.

Under the statute, Internet access for most users consists of two separate services. A conventional dial-up ISP provides its subscribers access to the Internet at a "point of presence" assigned a unique Internet address, to which the subscribers connect through telephone lines. The telephone service linking the user and the ISP is classic "telecommunications," which the Communications Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A provider of telecommunications services is a "telecommunications carrier," which the Act treats as a common carrier to the extent that it provides telecommunications to the public, "regardless of the facilities used." 47 U.S.C. § 153(44) & (46).

By contrast, the FCC considers the ISP as providing "information services" under the Act, defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20) (1996). As the definition suggests, ISPs are themselves users of telecommunications when they lease lines to transport data on their own networks and beyond on the Internet backbone. However, in relation to their subscribers, who are the "public" in terms of the statutory definition of telecommunications service, they provide "information services," and therefore are not subject to regulation as telecommunications carriers. *See Federal-State Joint Board on Universal Service*, 13 F.C.C.R. 11501, ¶¶ BM, CB, 1998 WL 166178 (1998) (report to Congress); *cf.* Child Online Protection Act, Pub.L. No. 105-277,

§ 1403(e)(4), 112 Stat. 2681 (1998) (codified at 47 U.S.C. § 231(e)(4)) & Internet Tax Freedom Act, Pub.L. No. 105-277, § 1101(e), 112 Stat. 2681 (1998) (reproduced at note to 47 U.S.C. § 151(e) (1998)) (defining Internet access services as: "a service that enables users to access content, information, electronic mail, or other services offered over the Internet, and may also include access to proprietary content, information, and other services as part of a package of services offered to consumers. Such term does not include telecommunications services."). Indeed, "information services"—the codified term for what the FCC first called "enhanced services"—have never been subject to regulation under the Communications Act. *See Howard v. America Online, Inc.*, 208 F.3d 741, 752-53 (9th Cir.2000); *see also* 47 C.F.R. § 64.702(a); *California v. FCC*, 905 F.2d 1217, 1223- 25 (9th Cir.1990) (discussing history of "enhanced services" non-regulation).

Like other ISPs, @Home consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Home is a conventional ISP, its activities are that of an information service. However, to the extent that @Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.

Under this taxonomy, the Communications Act bars Portland from conditioning the franchise transfer upon AT & T's provision of the @Home transmission element that constitutes telecommunications:

> (3)(A) If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—
>
> > (i) such cable operator or affiliate shall not be required to obtain a franchise under this title for the provision of telecommunications services; and
> >
> > (ii) the provisions of this title shall not apply to such cable operator or affiliate for the provision of telecommunications services.
>
> (B) A franchising authority may not impose any requirement under this title that has the purpose or effect of prohibiting, limiting, restricting, or conditioning the provision of a telecommunications service by a cable operator or an affiliate thereof.
>
> (C) A franchising authority may not order a cable operator or affiliate thereof—
>
> > (i) to discontinue the provision of a telecommunications service, or

(ii) to discontinue the operation of a cable system, to the extent such cable system is used for the provision of a telecommunications service, by reason of the failure of such cable operator or affiliate thereof to obtain a franchise or franchise renewal under this title with respect to the provision of such telecommunications service.

(D) Except as otherwise permitted by sections 611 and 612, a franchising authority may not require a cable operator to provide any telecommunications service or facilities, other than institutional networks, as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise.

Pub.L. No. 104-104, § 303(a), 110 Stat. 56, 124-25 (1996), codified at 47 U.S.C. § 541(b)(3); *see also* § 101(a), 110 Stat. at 70, codified at 47 U.S.C. § 253(a) ("No State or local statute or regulation, or other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service."). Subsection 541(b)(3) expresses both an awareness that cable operators could provide telecommunications services, and an intention that those telecommunications services be regulated as such, rather than as cable services.

The Communications Act includes cable broadband transmission as one of the "telecommunications services" a cable operator may provide over its cable system. Thus, AT & T need not obtain a franchise to offer cable broadband, *see* 47 U.S.C. § 541(b)(3)(A); Portland may not impose any requirement that has "the purpose or effect of prohibiting, limiting, restricting or conditioning" AT & T's provision of cable broadband, *see* 47 U.S.C. § 541(b)(3)(B); Portland may not order AT & T to discontinue cable broadband, *see* 47 U.S.C. § 541(b)(3)(C); and Portland may not require AT & T to provide cable broadband as a condition of the franchise transfer, *see* 47 U.S.C. § 541(b)(3)(D). Therefore, under the several provisions of § 541(b)(3), Portland may not regulate AT & T's provision of @Home in its capacity as a franchising authority, and the open access condition contained in the franchise transfer agreement is void.

C

Beyond the domain of cable-specific regulation, the definition of cable broadband as a telecommunications service coheres with the overall structure of the Communications Act as amended by the Telecommunications Act of 1996, and the FCC's existing regulatory regime. Elsewhere, the Communications Act contemplates the provision of telecommunications services by cable operators over cable systems. *See, e.g.*, 47 U.S.C. § 224(d)(3) (authorizing FCC utility pole attachment rate-setting "for any pole attachment used by a cable system . . . to provide any telecommunications service."). In the Telecommunications Act, Congress defined advanced telecommunications capability "without regard to any transmission media or

technology," in terms that describe cable broadband: "high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology." Pub.L. 104-104, § 706(c)(1), 110 Stat. 56, 153 (1996) (reproduced at note under 47 U.S.C. § 157). Consistent with our view, the FCC regulates DSL service, a high-speed competitor to cable broadband, as an advanced telecommunications service subject to common carrier obligations. *See GTE Operating Companies Tariff No. 1*, 13 F.C.C.R. 22466, 1998 WL 758441 (1998).

Among its broad reforms, the Telecommunications Act of 1996 enacted a competitive principle embodied by the dual duties of nondiscrimination and interconnection. *See* 47 U.S.C. § 201(a) ("It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor"); 47 U.S.C. § 251(a)(1) ("Each telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"). Together, these provisions mandate a network architecture that prioritizes consumer choice, demonstrated by vigorous competition among telecommunications carriers. As applied to the Internet, Portland calls it "open access," while AT & T dysphemizes it as "forced access." Under the Communications Act, this principle of telecommunications common carriage governs cable broadband as it does other means of Internet transmission such as telephone service and DSL, "regardless of the facilities used." 47 U.S.C. § 153(46). The Internet's protocols themselves manifest a related principle called "end-

to-end": control lies at the ends of the network where the users are, leaving a simple network that is neutral with respect to the data it transmits, like any common carrier. On this rule of the Internet, the codes of the legislator and the programmer agree.

Thus far, the FCC has not subjected cable broadband to any regulation, including common carrier telecommunications regulation. We note that the FCC has broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest. *See* 47 U.S.C. § 160(a). Congress has reposed the details of telecommunications policy in the FCC, and we will not impinge on its authority over these matters.

III

We hold that subsection 541(b)(3) prohibits a franchising authority from regulating cable broadband Internet access, because the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act. Therefore, Portland may not condition the transfer of the cable franchise on non-discriminatory access to AT & T's cable broadband network. We need not reach AT & T's other statutory and constitutional arguments.

REVERSED.

APPENDIX B — TELECOMMUNICATIONS ACT OF 1996, § 706, PUB. L. NO. 104-104 (1996), 110 STAT. 153, *REPRINTED IN* 47 U.S.C. § 157 NOTE

* * * * *

HISTORICAL AND STATUTORY NOTES

* * * * *

Advanced Telecommunications Incentives

Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended *Pub.L. 107-110, § 1076*(gg), Jan. 8, 2002, 115 Stat. 2093, provided that:

"**(a) In general.**—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

"**(b) Inquiry.**—The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

"**(c) Definitions.**—For purposes of this subsection:

> "**(1) Advanced telecommunications capability.**—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

Appendix B

"**(2) Elementary and secondary schools.**—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [*20 U.S.C.A. § 7801*]."

[Except as otherwise provided, amendments by *Pub.L. 107-110* effective Jan. 8, 2002, see *Pub.L. 107-110, § 5*, set out as a note under *20 U.S.C.A. § 6301*.]

(7)

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IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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REPLY BRIEF

In parallel with the petition of the FCC and the United States, our petition sought to demonstrate that further review is warranted (1) by the exceptional importance of broadband and the way in which it is regulated; (2) by the court of appeals' refusal to defer to the FCC's reasonable exercise of congressionally delegated authority; and (3) by a persistent conflict of authority concerning a question relating to *stare decisis*. The three respondents that oppose the petitions (Earthlink, Brand X, and the CPUC) agree with us on the first point,[1] but disagree on the others. As shown below, however, their objections are unpersuasive.

I. THE FCC'S READING IS REASONABLE.

A. Respondents' primary argument for denying the petitions is that the statute unambiguously (*i.e.*, as a matter of *Chevron* "step one") precludes the FCC's interpretation — a view that, they say, the Ninth Circuit embraced.[2] That is an inaccurate description of the *Portland* and *Brand X* opinions. Because the *Portland* court wrote before the FCC acted, it had no reason to — and did not — determine whether, for *Chevron* purposes, the statute compelled any one reading. Nor did the *Brand X* court view the *Portland* precedent that way.[3] At best, then, respondents can argue only that the *Brand X* court *could*

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[1] *See, e.g.*, Earthlink at 13 ("the question is important").

[2] *See, e.g., id.* at 25-26 ("the Ninth Circuit's decision in *Portland* was based on a plain meaning analysis that was equivalent to a *Chevron* step one analysis"); Brand X at 22 (describing *Brand X* opinion as "concluding that [the Ninth Circuit's] earlier decision in *AT&T v. City of Portland* had established the plain meaning of the 1996 Telecommunications Act"); CPUC at 11 (stating that *Portland* court "undert[ook] a *Chevron* step-one type analysis").

[3] *See* Pet. App. 17a ("we never stated in *Portland* that our interpretation was the only one possible").

have based its decision on a "step one" ground. But that alternative ground has never been embraced by even a single court: it is supported only by respondents' say-so.

Moreover, it is clearly wrong. The FCC's interpretation — under which "telecommunications" is a "telecommunications service" only when it is sold on a stand-alone basis — is reasonable. "Telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public."[4] Those words do not compel a reading that captures functionality not sold on a stand-alone basis.[5] Contrary to respondents' arguments,[6] the FCC did not read "on a stand-alone basis" into the statute; rather, it reasonably interpreted ambiguous language,[7] while at the same time carefully avoiding a reading that would render any "statutory term superfluous."[8]

It is unconvincing for Earthlink to argue that, if a cable-modem-service-providing cable operator is providing an "information service," it must also be providing "telecommunications" to the public, and thus a "telecommunications service."[9] The Communications Act defines "information service" as involving access to information "via

[4] 47 U.S.C. § 153(46).

[5] *See Random House Webster's Unabridged Dictionary* 1344 (2001) ("to offer" means "to present for sale"); *id.* at 747 ("for" means "in consideration or payment of"); *id.* at 706 ("fee" means "a sum paid or charged for a privilege"); *id.* at 559 ("direct" means "without intervening persons, influences, factors, etc.").

[6] *See* Earthlink at 18; CPUC at 20-21.

[7] *See, e.g., Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 47 (2002) (far from having "insert[ed] words into the statute," agency carried out its duty to "resolve any ambiguities and fill in any holes in the statutory scheme").

[8] *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477 (2003).

[9] Earthlink at 22-24.

telecommunications" — not via "telecommunications service."[10] Cable modem service does involve "telecommunications": it plainly involves "transmission . . . of information."[11] This "telecommunications," however, is not offered separately. Because it is thus not being "offer[ed] . . . for a fee directly to the public," there is no "telecommunications service."[12]

Indeed, accepting respondents' arguments would mean that *all* ISPs constitute providers of "telecommunications service." ISPs provide the same service to the end user whether they are affiliated or unaffiliated with the owner of the local distribution network.[13] That would mean that even ISPs like Earthlink and Brand X would be subject to regulation as telecommunications carriers. Respondents obviously do not favor that outgrowth of their reasoning and try to avoid it by arguing that only *facilities-based* firms can provide "telecommunications service."[14] That notion, however, has no basis in the statute: the definition of "telecommunications service" contains no requirement that a provider own facilities. The contortions needed to avoid the consequences of respondents' reasoning demonstrate its basic infirmity.

B. Next, respondents argue that the FCC's interpretation is at odds with the agency's pre-1996-Act *Computer* policies, which, respondents apparently believe, means

[10] 47 U.S.C. § 153(20).

[11] *Id.* § 153(43).

[12] *Id.* § 153(46).

[13] *Cf. United States v. Western Elec. Co.*, 907 F.2d 160, 163 (D.C. Cir. 1990) ("A taxi company . . . offers taxi service for hire whether or not it owns or leases its cabs.").

[14] *See* CPUC at 21 n.8; *see also* CPUC Ninth Circuit Br. at 27-28, 31; Earthlink Ninth Circuit Br. at 39 n.12; Brand X Ninth Circuit Br. at 31 n.35; Earthlink Ninth Circuit Reply Br. 19-20 n.11.

that the FCC's reading is unreasonable for purposes of *Chevron* "step two." That is wrong too.

1. In the 1960s, technological progress made it possible to use telephone lines to connect mainframe computers to remote terminals. This raised two questions for the FCC: (1) whether computer services made available over telephone lines should be subjected to regulation, and (2) whether the computer-services business should be open to telephone companies.[15] In connection with the former question, the FCC was reluctant to regulate competitive parts of the economy only indirectly related to its communications mandate.[16] On the latter question, the FCC feared that, if telephone companies were permitted to hold a competitive stake in the adjacent industry, they would acquire an incentive to deny computer-services rivals essential telephone inputs, thereby leveraging their market power from the naturally monopolistic telephone industry into the competitive computer-services industry.[17]

In the end, the FCC decided not to regulate the computer-services industry: "enhanced services" (the rough equivalent of today's "information services") would remain unregulated — even though they involved "communications by wire" and were thus within the agency's regulatory jurisdiction.[18] In addition, the FCC decided to permit telephone companies to provide computer services, subject to certain regulatory safeguards. In particular, the FCC formulated a policy that all telephone companies should continue to make available the "basic" telecommu-

[15] *See Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 16 (1980) ("*Computer II*").

[16] *See id.* ¶ 116.

[17] *See id.* ¶¶ 15, 18.

[18] *See id.* ¶¶ 114, 119, 121, 124, 127.

nications services underlying their "enhanced" computer-related services on tariffed terms.[19] That way, computer-service rivals would have equal access to telephone inputs.

Later, the FCC was compelled to add an auxiliary principle: that telephone companies cannot avoid common-carrier regulation by bundling computer functionality with basic services. In drawing the line between "basic" and "enhanced," the FCC had held that, whenever a basic service is bundled with an enhanced service, the bundle constitutes an enhanced service.[20] Pointing to this logic, telephone companies sought to liberate themselves from common-carrier regulation by arguing that, if they added enhanced services to basic services, the product was enhanced and therefore unregulated. The FCC disagreed: telephone companies would not be allowed to use this reasoning to skirt their pre-existing obligations.[21]

[19] *See id.* ¶ 231 ("those carriers that own common carrier transmission facilities and provide enhanced services . . . must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized"). Insofar as common carriers not owned by AT&T or GTE were concerned, this policy was not formally codified in a regulation. *See id.* at pp. 498-99.

[20] *See, e.g., id.* ¶ 110 ("Providers of . . . computer services acquire the necessary transmission facilities from communications common carriers pursuant to tariff, and resell this transmission capability as part of their enhanced offering."); *Independent Data Communications Mfrs. Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶ 18 (CCB 1995) (providers of "enhanced protocol processing services in conjunction with basic transmission services have historically been treated as unregulated enhanced service providers").

[21] *See, e.g., Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd 1, ¶ 274 (1988) ("the addition of . . . enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations"); *Inde-*

2. According to respondents, the FCC's decision that cable modem service does not contain a separate telecommunications service is inconsistent with this auxiliary principle.[22] By its terms, however, the *Computer* policy applies only to "carriers that own common carrier transmission facilities."[23] As providers of cable-television service, cable operators have never been considered common carriers.[24]

Nor does the *reasoning* in the *Computer* orders compel treating cable modem service as having a separate "telecommunications service" component. It is true that, in the *Computer* context, the FCC ruled that a common carrier cannot avoid tariffing a basic service by bundling it with computer functionality. As the FCC reasonably determined, however, that does not imply that it should compel tariffing when a company has never offered the service in question (or, for that matter, any other service) on a common-carrier basis.[25] Indeed, even in the telephone context, the *Computer* principles have never been applied to compel the common-carrier offering of a service that a telephone company did not previously offer on a stand-alone basis voluntarily.[26]

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pendent Data ¶ 44 (contrary rule "would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework").

[22] *See* Earthlink at 19-20; Brand X at 25-26; CPUC at 24.

[23] *Computer II* ¶ 231.

[24] *See* 47 U.S.C. § 541(c); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968); *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

[25] *See* Pet. App. 95a (¶ 43) ("EarthLink invites us, in essence, to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act. Such radical surgery is not required.").

C. Respondents make three other telecommunications-related arguments. *First*, respondents suggest that the possibility of forbearance makes this case undeserving of the Court's attention — on the theory (1) that Section 10 of the Communications Act does not hold its forbearance hoops very high, and (2) that, in any event, jumping through those hoops is statutorily required.[27] The latter assumes the answer to the question presented: whether the FCC is required to jump through Section 10's hoops depends on whether cable modem service is a "telecommunications service." The former is simply wrong: Section 10(a) requires the FCC to make detailed findings that are reviewable in court,[28] which no doubt explains respondents' efforts to force the FCC down this route.

Second, Earthlink argues that the FCC's interpretation of "telecommunications service" is never entitled to deference.[29] This is so, Earthlink argues, because a 1976 D.C. Circuit decision suggested that the term "common carrier" was so well-defined at common law as to strip the FCC of interpretive discretion.[30] But the D.C. Circuit's opinion in that case stated only that the FCC may

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[26] Contrary to respondents' arguments (Brand X at 26; CPUC at 24), the FCC's refusal to extend *Computer II* to cable operators does not violate the "regardless of the facilities used" language in 47 U.S.C. § 153(46). Respondents are seeking to use *Computer II* to make "telecommunications service" out of something that otherwise would not be and thus is not within the definition of Section 153(46).

[27] *See* Earthlink at 29-30; Brand X at 29-30; CPUC at 27.

[28] *See* 47 U.S.C. § 160(a).

[29] *See* Earthlink at 16-17.

[30] *See id.* at 16 (citing *National Ass'n of Regulatory Utility Commissioner's v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976)).

not define "common carrier" in a way contrary to the common law, something that the FCC has not done here. Indeed, more recently, the D.C. Circuit held that the FCC's interpretation of "telecommunications service" *is* entitled to *Chevron* deference.[31]

Finally, the CPUC relies on Section 706(a) — ironically, a provision urging regulators to promote new services through deregulation — as indicating that Congress intended to subject cable modem service to common-carrier regulation.[32] Although the FCC has said (in passing, when nothing turned on it) that cable modem service constitutes "advanced telecommunications capability" for purposes of Section 706,[33] that reading plainly was not compelled by Section 706's text. Thus, Section 706(a) cannot be read as an implicit indication that Congress believed that cable modem service includes a "telecommunications service." Besides, even though Section 706 addresses bodies "with regulatory jurisdiction over telecommunications services," that does not mean that Congress believed that all capabilities promoted must necessarily constitute "telecommunications services."

II. GRANTING REVIEW WOULD ENABLE THE COURT TO RESOLVE A CONFLICT OF AUTHORITY CONCERNING *STARE DECISIS*.

Our petition further demonstrates that granting review would afford the Court an opportunity to resolve a conflict of authority concerning the question whether a court of appeals may decline to accord *Chevron* deference to an agency's reasonable interpretation of ambiguous statutory

[31] *See Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925 (D.C. Cir. 1999).

[32] *See* CPUC at 22-23, 25.

[33] *See* Pet. App. 126a (¶ 70).

language where a circuit precedent antedating the agency's decision interpreted that language differently. Respondents answer by saying that the conflict is not implicated — on the theory that "the Ninth Circuit's decision in *Portland* was based on a plain meaning analysis that was equivalent to a *Chevron* step one analysis."[34] As already explained, however, that is an inaccurate description of the *Portland* decision: the Ninth Circuit had no reason to and did not determine whether the statute is unambiguous.

Brand X and the CPUC (but not Earthlink) also deny that a conflict of authority exists in the first place. According to these respondents, "most" of the cases we cited predate *Neal*, and must therefore be assumed to have been superseded.[35] They ignore that the language in *Neal* was preceded by similar language in *Maislin* and *Lechmere*, and that, despite that language, various courts of appeals adopted an approach different from that of the Ninth Circuit. Respondents' suggestion that *Neal*'s unexplained omission of the word "clear" will cause these courts to repudiate their position is not credible.

Indeed, post-*Neal* decisions show precisely that: courts have adhered to their prior approaches. Respondents attempt to minimize *Heimmermann* as "neither cit[ing] nor discuss[ing] *Neal*,"[36] but fail to mention that the *Heimmermann* court adhered to *Oman* even though the appellant had expressly requested overruling in light of *Neal*.[37] Respondents attempt to minimize *Reich* as also resting on

[34] Earthlink at 25-26; *see also* CPUC at 29.

[35] *See* CPUC at 28 n.10.

[36] *Id.*

[37] *See* Appellant's Brief at 5 n.3 (available at 2001 WL 34121025) ("*Oman* was decided before *Neal*, which expressly limited *Chevron* deference to situations where a court has not already issued a statutory interpretation").

an alternative ground,[38] but do not explain why that signals a change in direction. Finally, respondents attempt to minimize *Aguirre* as representing a voluntary revisiting of prior precedent,[39] thereby engaging in an exercise in semantics: *Aguirre* adhered to the Second Circuit's view that, despite prior precedent, courts must give deference to reasonable agency interpretations.[40]

Finally, only Brand X defends the merits of extending *Neal* to the court of appeals level. According to Brand X, doing so does not threaten uniformity — on the theory that the Hobbs Act channels review of FCC decisions to a single court in any event.[41] But the Hobbs Act applies to only a few agencies, and then to only some of their decisions.[42] Besides, even where it applies, the Hobbs Act does not solve the uniformity problem when the same issue arises in separate cases.[43]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[38] CPUC at 28 n.10.

[39] *See id.*; Brand X at 23 & n.66

[40] *See Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir.1996) ("the interests of nationwide uniformity outweigh our adherence to Circuit precedent").

[41] *See* Brand X at 22 n.64.

[42] *See* 28 U.S.C. § 2342.

[43] *See, e.g., Nixon v. Missouri Mun. League*, 124 S.Ct. 1555 (2004) (resolving conflict between courts of appeals that, each hearing appeals pursuant to the Hobbs Act, had reached different results).

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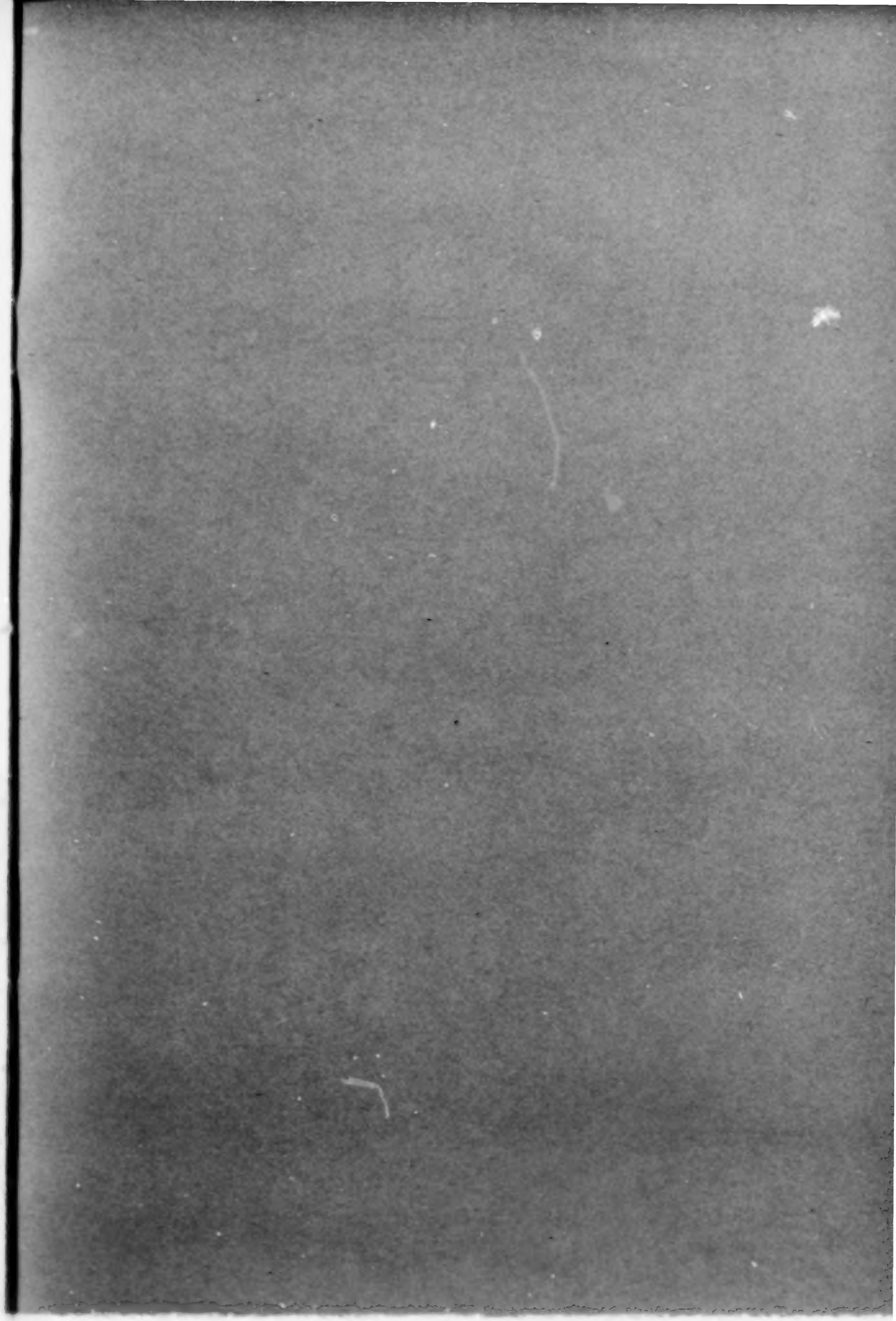

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IN THE
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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether, under the framework set out in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the FCC was entitled to decide that, for purposes of regulation under the Communications Act, cable operators offering so-called "cable modem service" (high-speed Internet access over cable television systems) provide only an "information service" and not a "telecommunications service."

LIST OF PARTIES TO THE PROCEEDINGS

In the consolidated proceedings below, petitioners National Cable & Telecommunications Association ("NCTA"), Charter Communications, Inc., Cox Communications, Inc., Time Warner Inc., and Time Warner Cable Inc. were intervenors in support of the Federal Communications Commission and the United States.

Also intervening in the proceedings below were the Association of Communications Enterprises, AT&T Corp., BellSouth Corporation, BellSouth Telecommunications, Inc., Competitive Telecommunications Association, Focal Communications Corp., the Information Technology Association of America, the Utility, Cable & Telecommunications Committee of the City Council of New Orleans, the City and County of San Francisco, SBC Communications, Inc., the State of Vermont, the Vermont Department of Public Service, the Vermont Public Service Board, and WorldCom, Inc.

In the court of appeals, the petitioners were Brand X Internet Services LLC, Buckingham Township, the People of the State of California ex rel. Bill Lockyer, the Center for Digital Democracy, Conestoga Township, Consumer Federation of America, Consumers Union, Earthlink, Inc., East Hempfield Township, Martic Township, the National Association of Counties, the National Association of Telecommunications Officers and Advisors, the National League of Cities, Providence Township, the Public Utilities Commission of the State of California, the Texas Coalition of Cities for Utilities Issues, Verizon Internet Solutions d/b/a Verizon.net, Verizon Telephone Companies, and the United States Conference of Mayors.

CORPORATE DISCLOSURE STATEMENT

No publicly held company owns an interest of 10% or more in NCTA, Charter Communications, Inc., Cox Communications, Inc., or Time Warner Inc.

Time Warner Inc. and Comcast Corporation, both publicly held companies, each own an interest of 10% or more in Time Warner Cable Inc.

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BRIEF FOR CABLE-INDUSTRY PETITIONERS

This case concerns the proper regulatory treatment of so-called cable modem service, which is high-speed Internet service provided by cable operators over cable television systems. The FCC determined that, for purposes of regulation under the Communications Act, cable modem service constitutes solely an "information service" and does not include a separately cognizable "telecommunications service" component. The question here is whether, under the familiar framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), that interpretation of the Communications Act must be upheld. The answer is clearly yes.

The Communications Act defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). It further defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Separately, the Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(20). The FCC has stated that, under the Communications Act, providers of "telecommunications services" are presumptively subject to common-carrier duties, whereas providers of "information services" are left unregulated.

The FCC correctly held — and all parties here agree — that cable modem service, which is merely a form of Internet service and thus includes extensive computer functionality, constitutes an "information service." The FCC further held that, although "information service" is

by definition provided "via telecommunications," the "telecommunications" is integral to the service and not a separate "offering . . . for a fee directly to the public." That is the best reading of the statute and certainly constitutes a permissible interpretation. It must therefore be upheld under the *Chevron* doctrine, and the judgment of the court of appeals must be reversed.

To reach that result, the Court need not resolve the *stare decisis* issue that kept the court of appeals from extending *Chevron* deference to the FCC's regulatory classification — although, as we explained in our petition for a writ of certiorari, this case does provide an opportunity to address that issue. If the Court reaches the *stare decisis* issue, it should state that the court of appeals erred. *Chevron* rests on the premise that statutory silence or ambiguity reflects an implicit delegation of legislative authority. Thus, *stare decisis* no more precludes a court from deferring to a reasonable administrative interpretation of a statute committed to an agency's administration than it precludes a court from obeying subsequent statutory amendments.

OPINION AND ORDER BELOW

The opinion of the Court of Appeals (Pet. App. 1a-39a) is reported at 345 F.3d 1120. The FCC's order (Pet. App. 40a-203a) is reported at 17 FCC Rcd 4798.[1]

JURISDICTION

The court of appeals entered its judgment on October 6, 2003. Pet. App. 1a. The court of appeals denied petitions for rehearing and rehearing *en banc* on March 31, 2004. *Id.* at 204a. On June 18, Justice O'Connor extended the time within which to file a petition for a writ

[1] All references to "Pet. App." are to the appendix to the petition in No. 04-281.

of certiorari to and including July 29, 2004. On July 20, 2004, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including August 30, 2004. The petition was filed on that date. It was granted on December 3, 2004, together with the Government's petition in No. 04-281. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Portions of relevant provisions of the Communications Act of 1934 are reprinted at Pet. App. 208a-213a.

STATEMENT

1. When residential consumers first began to use the Internet in the early 1990s, they generally did so over telephone "dial-up" connections, using a regular telephone line to connect to a point of presence of an Internet Service Provider ("ISP") simply by having their computer dial a local telephone number associated with the ISP's modem pool.[2] The ISP would then convert the telephone signal to an Internet protocol signal and transmit it to the selected destination on the Internet. Dial-up service, however, was relatively slow: its speed was impeded by the limited bandwidth of voice circuits over telephone companies' copper wire.[3]

In the ensuing years, cable television companies spent billions of dollars upgrading their facilities to support "cable modem service." *See* Pet. App. 58a (¶ 12). This service, which cable operators began to make available around 1998, allows subscribers to access the Internet by connecting a traditional coaxial cable television wire to a

[2] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Notice of Inquiry, 15 FCC Rcd 19287, ¶ 6 (2000) ("*Notice of Inquiry*").

[3] *See id.* ¶ 8; Pet. App. 4a.

computer via a cable modem. *See* Pet. App. 60a (¶ 12). The coaxial connection allows much greater bandwidth — and thus greater speed — than a dial-up connection. *See* Pet. App. 54a (¶ 10). Moreover, the connection is "always on": the user need not "dial up" an ISP to initiate a session. *See Notice of Inquiry* ¶ 8. These qualities made cable modem service very popular, and its growth has been explosive.[4]

The success of cable modem service prompted telephone companies to introduce a high-speed (or "broadband") Internet service of their own: Digital Subscriber Line or DSL service.[5] DSL is provided over regular copper telephone wire, but, like cable modem service, it is nonetheless "always on" and enables transmission speeds much greater than traditional dial-up. *See* Pet. App. 50a (¶ 9). Later, other forms of high-speed Internet service developed, including service provided via fiber, terrestrial wireless, satellite, and power lines.[6] High-speed Internet service is now robustly competitive: "the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to

[4] *See* Industry Analysis and Tech. Div., Wireline Competition Bureau, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at Table 1 (rel. Dec. 22, 2004) (available at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1204.pdf) (counting 18.6 million subscribers by June 2004).

[5] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 15 FCC Rcd 9816, ¶ 117 (2000).

[6] *See generally Availability of Advanced Telecommunications Capability in the United States*, Fourth Report to Congress, 19 FCC Rcd 20540 (2004).

offer increasingly faster service at the same or even lower retail prices."[7]

2. In dial-up communications, an important part of the business of ISPs like respondents Earthlink and Brand X consisted of connecting and converting traditional "circuit-switched" voice communications to the "packet-switched" communications of the Internet. They could be in this business because common-carrier telephone companies were already making available stand-alone voice circuits that could also be used for data transmission. Indeed, having held out basic connectivity to all comers, telephone companies were prohibited (by Title II of the Communications Act) from denying ISPs this connectivity.[8] The FCC also had special rules relating to computer-related services (the so-called *Computer II* rules) that obligated telephone companies to continue making circuits available at tariffed rates.[9]

Things were different, however, insofar as cable modem service was concerned. Unlike telephone companies, cable operators had never provided basic connectivity on a common-carrier basis, and they were offering cable modem service on an integrated basis. *See id.* at 70a (¶ 20). Subscribers could still access content provided by unaffiliated ISPs, *see id.* at 78a (¶ 25), but unaffiliated ISPs' dial-up conversion services were not used or needed to allow cable subscribers to connect to the Internet.

Some ISPs responded by requesting that regulators force cable operators to provide transport in much the

[7] *Id.* at 20552.

[8] *See generally* 47 U.S.C. § 201, *et seq.*

[9] *See generally Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980) ("*Computer II*").

same way telephone companies did.[10] These ISPs acknowledged that cable modem service, like dial-up Internet access service, constituted an "information service" ("the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications," 47 U.S.C. § 153(20)), which the Communications Act left unregulated. But, ISPs argued, cable modem service also includes a common-carrier service — or, in the words of the newly enacted Telecommunications Act of 1996, a "telecommunications service," defined as "the offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications," in turn, is separately defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

Relying on these definitions, ISPs and others argued that cable operators providing cable modem service should be treated as "common carriers," which in their view meant that cable operators were required to provide "access" to unaffiliated ISPs. Cable operators, for their part, argued that cable modem service did not constitute or contain a "telecommunications service." They argued that common carrier regulation would impose a grave burden, thereby deterring them from investing in facilities necessary to increase the proliferation of broadband service. They argued that nothing in the statutory definitions implied that Congress had meant to impose these burdens,

[10] *See generally Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶¶ 75-91 (1999).

and that, if Congress had meant to do so, it would have done so expressly — not through relatively indeterminate definitions.

Courts reached different conclusions concerning cable modem service's classification. The Eleventh Circuit held that cable modem service constituted only an "information service."[11] But, in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), a decision that would later have important repercussions for the instant case, the Ninth Circuit stated that, although cable modem service was an "information service," it had a separate "telecommunications service" component. *See id.* at 878.

3. Recognizing the need "to develop a national legal and policy framework in light of recent federal court opinions that have classified cable modem service in varying manners," the FCC in September 2000 opened a rulemaking proceeding with the goal of determining "what regulatory treatment, if any, should be accorded to cable modem service." *Notice of Inquiry* ¶¶ 1, 2. By doing so, the FCC intended "to instill a measure of regulatory stability in the market to encourage investment in all types of high-speed networks and innovation in high-speed services." *Id.* ¶ 2. In the next 18 months, the agency received over 250 written submissions and conducted numerous meetings with industry, government, and consumer advocates. *See* Pet. App. 9a, 42a-43a. The FCC's rulemaking proceeding resulted in a decision released on March 15, 2002 — the order here under review.

a. In that order, the FCC determined that "cable modem service as currently provided is an . . . information

[11] *See Gulf Power Co. v. FCC*, 208 F.3d 1263, 1275-78 (11th Cir. 2000), *rev'd on other grounds, National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002).

service, . . . and that there is no separate telecommunications service offering to subscribers or ISPs." *Id.* at 88a (¶ 33). The FCC reached this outcome by taking account of "the nature of the functions that the end user is offered." *Id.* at 94a (¶ 38). Cable modem service, the FCC observed, offered the same functions as dial-up Internet access: "[e]-mail, newsgroups, the ability for the user to create a web page," and access to the "DNS" or Domain Name System (the central database that enables web-browsing). *Id.* at 93a (¶ 38). Thus, the FCC found that, like dial-up service, "cable modem service is an offering of Internet access service, which combines the transmission of data with computer processing, information provision, and computer interactivity." *Id.* at 94a (¶ 38). As such, the FCC held, cable modem service met the Act's definition of an "information service." *Id.* at 95a (¶ 38).

The FCC rejected arguments that cable modem service "include[s] an offering of telecommunications service to subscribers." *Id.* (¶ 39). As the FCC noted, "[w]e are not aware of any cable modem service provider that has made a stand-alone offering of transmission for a fee directly to the public." *Id.* at 97a (¶ 40). The FCC acknowledged that cable modem service includes a "telecommunications" component: by definition, any "information service" is provided "via telecommunications." *See id.* at 96a (¶ 39). But, the agency reasoned, "[t]hat telecommunications component is not . . . separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Id.* "Our analysis, like the relevant statutory definitions," the FCC concluded, "focuses . . . on the single, integrated information service that the subscriber to cable modem service receives." *Id.* at 98a (¶ 41).

The FCC also rejected arguments that, if cable operators were not providing a "telecommunications service," they should be forced to "create" one. *See id.* at 99a (¶ 42). Some ISPs had argued that this result was required by the FCC's *Computer II* rules, which, they said, "required common carriers that provide information services to offer the underlying telecommunications as a stand-alone service." *Id.* But the *Computer II* rules, the FCC observed, by their terms applied only to "traditional wireline common carriers providing telecommunications services (*e.g.*, telephony) separate from their provision of information services." *Id.* at 100a (¶ 43). The FCC "decline[d] to extend *Computer II*" to cable operators offering "an integrated combination of transmission and the other components of cable modem service." *Id.*

b. The FCC acknowledged that, in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit had reached a contrary conclusion. *Id.* at 114a (¶ 56). In that case, the issue had been whether a municipality was allowed to impose ISP "access" obligations on a cable operator seeking to transfer its cable franchise — a question that, in the end, the court answered in the negative. *See id.* at 880. In an opinion by Judge Thomas, the court had apparently concluded that, to resolve this question, it had to determine whether the service included a separate "telecommunications service" component. *Id.* at 878-79. At the outset, the court had noted that, because the FCC had not yet addressed the issue, it did not owe "deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Id.* at 876. Thus unconstrained, the court had stated that, when a cable operator "provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *Id.* at 878.

The FCC did not feel bound by the Ninth Circuit's classification. The FCC noted that, whereas it was "considering the broad issue of the appropriate national framework for the regulation of cable modem service, the *Portland* court had considered a much narrower issue — whether a local franchising authority . . . had the authority to condition its approval of a cable operator's merger on the operator's grant of multiple ISP access." Pet. App. 114a (¶ 56). Moreover, said the FCC, because the *Portland* parties had not briefed the classification issue, "[t]he Ninth Circuit's decision was based on a record that was less than comprehensive." *Id.* at 115a (¶ 57). In addition, the FCC viewed the Ninth Circuit's "telecommunications service" classification as unnecessary: "[t]he Ninth Circuit could have resolved the narrow question before it by finding that cable modem service is not a cable service." *Id.* at 115a-116a (¶ 58). In any event, the FCC disagreed with the Ninth Circuit on the merits: "Though by definition an information service includes a telecommunications component, the mere existence of such a component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber." *Id.* at 116a (¶ 58).

4. Numerous parties sought judicial review pursuant to the Hobbs Act, *see* 47 U.S.C. § 402(a); 28 U.S.C. § 2341, *et seq.*: in all, seven petitions for review were filed in the Third, Ninth, and D.C. Circuits. *See* Pet. App. 10a. Pursuant to the random selection procedure specified in 28 U.S.C. § 2112(a)(3), the Judicial Panel on Multidistrict Litigation consolidated all petitions in the Ninth Circuit — the one court that, prior to the FCC's order, had held that cable modem service included a "telecommunications service." *See* Pet. App. at 11a. The undersigned cable-industry petitioners intervened and filed a joint brief in support of the FCC.

In a *per curiam* opinion, a panel of the Ninth Circuit affirmed in part and vacated in part. *Id.* at 22a. The court began its analysis by observing that, "[n]ormally, when we review an agency's interpretation of the statute it is charged with administering, we apply the two-step formula set forth by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*" *Id.* at 11a (citation omitted). The court went on to hold, however, that, in light of the prior *Portland* decision, it could not follow the *Chevron* framework in this case. Because "three-judge panels are bound by the holdings of earlier three-judge panels," the court reasoned, "*Portland*'s construction of the Communications Act remains binding precedent within this circuit, even in light of the FCC's contrary interpretation of the statute." *Id.* at 19a, 21a.

The court of appeals found support for its result in *Neal v. United States*, 516 U.S. 284 (1996), in which this Court stated that, "'[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law.'" Pet. App. 20a (quoting *Neal*, 516 U.S. at 295). "Notwithstanding the Supreme Court's use of the term 'we,'" the court of appeals stated, "there is nothing to suggest that *Neal*'s rule should apply only when it is the Supreme Court (and not the courts of appeals) construing the statute in question, and the Court itself has never asserted that the power authoritatively to interpret statutes belongs to it alone." Pet. App. 20a.

Having concluded that it was required to adhere to *Portland*, the panel viewed its analysis as being at an end. "Because the Commission's Declaratory Ruling agreed with our conclusion [in *Portland*] that cable broadband service is not 'cable service,' but disagreed with our conclusion that it is in part 'telecommunications service,'" the

court affirmed in part, vacated in part, and remanded for further proceedings. *Id.* at 21a-22a. Saying that "the various petitioners' claims all revolve around the FCC's central classification decision," the court "decline[d] . . . to consider their remaining claims . . . , leaving them for reconsideration by the FCC on remand." *Id.* at 22a n.14.

In a separate concurrence, Judge O'Scannlain agreed that the Ninth Circuit's *stare decisis* principles required the panel to follow *Portland*, but criticized those principles as "produc[ing] a result strikingly inconsistent with *Chevron*'s underlying principles." *Id.* at 22a (internal quotation marks and citation omitted). *Stare decisis*, Judge O'Scannlain noted, ordinarily serves as a "check on judicial power," but "adherence to *stare decisis* in the present case — coming as it does in a decision that determines the outcome of seven different petitions for review from three different circuits consolidated and assigned randomly to this court by the Judicial Panel on Multidistrict Litigation — appears to aggrandize, rather than limit our power over an admittedly complicated and highly technical area of telecommunications law." *Id.* at 23a-24a. "Regardless of one's view of the wisdom of the FCC's declaratory ruling," Judge O'Scannlain concluded, "it cannot be denied that our holding today effectively stops a vitally important policy debate in its tracks, at least until the Supreme Court reverses us or Congress decides to act." *Id.* at 23a.

Judge Thomas, the author of the *Portland* opinion, also concurred separately. In his view, the case before the court did not "implicat[e] *Chevron* deference, not only for the reasons noted in [the court's] unanimous opinion, but also because [the classification question] is a question of pure statutory interpretation." *Id.* at 25a-26a. Regardless, Judge Thomas believed that "the statutory definitions, combined with the overall regulatory and legislative

context, compel the result that cable modem service includes a telecommunications service component." *Id.* at 39a. Thus, Judge Thomas stated, "even if we were writing on a clean slate, my conclusion would be the same as the one we reached in *City of Portland* as to the meaning of the statute." *Id.*

5. After the Ninth Circuit denied *en banc* review, the FCC and the United States filed a petition for review in this Court (No. 04-281), presenting the question "[w]hether the court of appeals erred in holding that the Federal Communications Commission had impermissibly concluded that cable modem service is an 'information service,' without a separately regulated telecommunications service component, under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*" Fed'l Pet. at I. Presenting a similar question, the undersigned cable-industry parties filed a petition of their own (No. 04-277). *See* Cable Pet. at i. By order dated December 3, 2004, the Court granted both petitions. The cases were consolidated and a total of one hour was allotted for oral argument.

SUMMARY OF ARGUMENT

This Court should review the FCC's decision under the familiar *Chevron* framework. Applying that framework, the FCC's decision readily passes muster. The judgment of the court of appeals should therefore be reversed.

I

A. The FCC correctly held that cable modem service constitutes an "information service," a term defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." Cable modem service provides the same functionality as traditional dial-up Internet service, which, because it con-

stitutes an offering of a capability for interacting with information via telecommunications, the FCC long ago correctly classified as an "information service." In the order under review, the FCC reasonably extended that classification to cable modem service.

The FCC also acted lawfully in determining that cable modem service does not include a separate "telecommunications service" component. "Telecommunications" is an input into any information service: all information services involve computer functionality provided "via telecommunications." Viewing all information services as containing a separate "telecommunications service" component would undermine the longstanding policy of leaving information service providers unregulated.

The FCC's view is not at odds with the definition of "telecommunications service" as "the offering of telecommunications for a fee directly to the public." To the contrary, when an input contributes to the making of (and loses its separate existence in) a finished product, and when only the finished product is offered for sale, it is most logical to say that the input is not being offered for a fee directly to the public.

In the order under review, the FCC permissibly extended that interpretation to cable modem service. Nothing in the statutory definition suggests that cable operators who provide Internet service over their own cable systems should be treated differently from other Internet service providers.

B. Respondents' arguments to the contrary would each have the consequence that every information service would include a separate "telecommunications service" component, contrary to the FCC's long-standing policy. Respondents' argument for avoiding that consequence — that there is a separate "telecommunications service" only

when an information service provider relies on its own facilities — has no basis in the statutory text. The unintended consequence of respondents' reading and their inability to avoid it in a plausible way reflect their arguments' lack of soundness.

Besides, each of respondents' arguments fails on its own terms. *First*, the FCC did not impermissibly add words (supposedly, "on a stand-alone basis") to the definition of "telecommunications service." Instead, the FCC merely gave content to ambiguous language. *Second*, the FCC's reading is not undermined by the "via telecommunications" language in the definition of "information service." Cable modem service does involve "telecommunications," but there is no "offering of telecommunications for a fee directly to the public" if "telecommunications" is not offered separately. *Third*, the ambiguous snippets of legislative history on which respondents have relied are not probative: they relate to language in a bill that did not become law. *Finally*, the FCC's reading is not inconsistent with Section 706 of the Telecommunications Act. Although that provision calls on "State commission[s] with regulatory jurisdiction over telecommunications services" to promote "advanced telecommunications capability," those words do not imply that Congress believed that all capabilities promoted are "telecommunications services."

C. The FCC also did not act arbitrarily by refusing to rely on its *Computer II* policies to force cable operators to provide a separate telecommunications service. Under those policies, telecommunications inputs underlying information services must be provided separately only if the information services are offered by "carriers that own common carrier transmission facilities." Because cable operators are not classified as common carriers, the FCC reasonably determined that, by their terms, the *Computer*

II policies are inapplicable to cable operators providing cable modem service.

The FCC also acted reasonably in refusing to extend the *Computer II* policies, which were written at a time when information services could generally be provided only over the networks of monopoly telephone common carriers. It makes no sense to extend access policies to competitive cable networks, particularly when, in the FCC's expert view, broadband services are best promoted by leaving them unregulated, when that view has yielded robust broadband competition, and when the FCC is considering eliminating *Computer II* even with respect to telephone companies.

Nor is the FCC's refusal to extend *Computer II* inconsistent with the "regardless of the facilities used" language in the definition of "telecommunications service." This language determines what services constitute a "telecommunications service." It has no bearing on the question whether an entity should be compelled to provide a "telecommunications service" when it has chosen not to do so.

II

To dispose of this case, the Court need not address the *stare decisis* question that kept the Ninth Circuit from extending *Chevron* deference. If the Court addresses the issue, however, it should state that the Ninth Circuit erred.

A. Except where its precedent established a statute's clear meaning, this Court has never held that *stare decisis* trumps *Chevron* deference. Allowing precedent to have such effect would encourage regulated parties to race to the courthouse in the hopes of obtaining an interpretation by a court of their choosing before the agency has had an opportunity to interpret the statute. More fundamentally,

this Court held in *Chevron* that a statutory silence or ambiguity signals an implicit delegation of legislative authority. Judicial deference to the exercise of delegated legislative authority no more threatens judicial supremacy than does obeyance to the exercise of retained legislative authority.

B. *Stare decisis* certainly should not trump *Chevron* deference insofar as the precedent of lower courts is concerned. This Court has indicated that agencies retain *Chevron* discretion even after a lower court interprets a statute. That understanding is correct: any contrary view would impede uniformity among the circuits, place administrative agencies in an untenable position, and unnecessarily generate appeals to this Court.

ARGUMENT

I. UNDER THE DEFERENTIAL *CHEVRON* STANDARD, THE FCC'S CLASSIFICATION DECISION MUST BE UPHELD.

Now that this Court has accepted this case for review, the Ninth Circuit's *Portland* precedent no longer places any weight on the scale: plainly, this Court is not bound to follow the precedent of courts of appeals.[12] Thus, this

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[12] *See, e.g., INS v. Aguirre-Aguirre*, 526 U.S. 415, 428-31 (1999) (reversing decision in which court of appeals had refused to defer to agency's decision whose analysis contravened circuit precedent); *Chevron*, 467 U.S. at 841-42 (reversing decision in which court of appeals had set aside agency's decision as contrary to "two of [the court of appeals'] precedents," explaining that "[t]he basic legal error of the Court of Appeals was to adopt a static judicial definition of the term 'stationary source' when it had decided that Congress itself had not commanded that definition"); Richard J. Pierce, Jr., I *Administrative Law* § 3.6, at 185 (4th ed. 2002) ("The [Supreme] Court . . . frequently overrules circuit court precedents and upholds agency constructions that are inconsistent with circuit court

Court must review the FCC's decision under the familiar *Chevron* framework. Applying that framework, the FCC's decision readily passes muster.

A. The FCC's Statutory Reading Is, at a Minimum, a Permissible One.

1. No controversy surrounds the FCC's determination that, when a cable operator provides subscribers with cable modem service, those subscribers receive an "information service." As the FCC correctly explained, cable operators providing cable modem service offer subscribers the same functionality as providers of traditional dial-up Internet access.[13] That functionality includes the ability to create a webpage and to access e-mail, newsgroups, and the Domain Name System (or DNS), which enables browsing of the World Wide Web.[14] In a 1998 order, the FCC held that the bundle of those functionalities constitutes an "information service" when provided on a dial-up basis.[15] In the order under review, the FCC simply extended the same classification to Internet service provided over cable facilities.

That classification was undoubtedly permissible. "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[16] Each of the functions encompassed within Internet access service involves "generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." It is therefore not surprising that all parties here accept the "information service" classification, as did the *Portland* court and each of the judges on the panel below.

2. What *is* contested is the FCC's next determination: that, when a cable operator provides cable modem service, it does not provide the end user with a "telecommunications service." Respondents' claim that this view is foreclosed by the statute's unambiguous language faces an uphill (and, as shown below, losing) battle. This Court has noted that the Telecommunications Act of 1996 is "in many important respects a model of ambiguity."[17] Moreover, just three Terms ago (in the *Gulf Power* case, involving regulation of the rates that cable operators pay owners of utility poles), the Court characterized the specific issue presented here — the regulatory classification of cable modem service — as a particularly "hard questio[n]" involving "subject matter" that is "technical, complex, and dynamic."[18] In connection with such questions, deference is particularly appropriate.[19]

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precedents. . . . It has also criticized a circuit court for applying a circuit precedent, rather than conferring *Chevron* deference on an agency construction that conflicted with the circuit precedent.").

[13] *See* Pet. App. 94a (¶ 38) ("cable modem service is an offering of Internet access service").

[14] *See id.* at 91a-93a (¶ 37).

[15] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶¶ 73-80 (1998) ("*Report to Congress*").

[16] 47 U.S.C. § 153(20).

[17] *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999).

[18] *National Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 338 (2002).

[19] *See, e.g., Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512 (1994) ("broad deference is all the more warranted when, as here, the regulation concerns a complex and highly technical regulatory program, in which the identification and classification of relevant criteria necessarily require significant expertise and entail the exercise of judgment grounded in policy concerns") (internal quotation marks omitted).

3. The FCC has long held that the terms "information service" and "telecommunications service" are mutually exclusive: a service that constitutes an "information service" does not also constitute or contain a "telecommunications service."[20] As the FCC put it in its 1998 order, "telecommunications is an input in the provision of an information service."[21] Viewing that input as a separate service would have the effect of turning all providers of information services into providers of "telecommunications service," contrary to long-standing FCC policy leaving providers of information services unregulated.[22] If Congress had intended to overturn that policy, the FCC correctly reasoned, it no doubt would have made that intent express.[23]

The FCC's decision certainly constitutes a reasonable interpretation — and indeed reflects the best reading — of the definition of "telecommunications service" as "the of-

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[20] *See* Pet. App. 97a-98a (¶ 41).

[21] *Report to Congress* ¶ 69 n.138; *id.* ¶ 81 ("In offering service to end users, . . . [ISPs] do more than resell . . . data transport services. They conjoin the data transport with data processing, information provision, and other computer mediated offerings, thereby creating an information service.").

[22] *See id.* ¶ 45.

[23] *See id.*; *see also Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress, we have held, does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."); *American Hosp. Ass'n v. NLRB*, 499 U.S. 606, 613 (1991) ("As a matter of statutory drafting, if Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted . . . , we would have expected it to do so in language expressly describing [such] an exception."); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 693 (1983) (had "Congress intended such a novel result . . . it would have said so in far plainer language than that employed here").

fering of telecommunications for a fee directly to the public."[24] An "offering" is "something presented for . . . sale."[25] When a product is offered only as part of a bundle (and not by itself), it is entirely logical to say that the product is not being offered for a fee directly to the bundle's purchasers. That is particularly true when the product is an input that loses its separate existence in a finished product.[26]

4. In the order under review, the FCC simply extended this policy to cable operators that use their own facilities to provide Internet service.[27] The agency correctly saw no distinction in that difference: nothing in the statute suggests that providers of Internet service that own cable facilities should be treated differently from providers of Internet service that do not.[28] As the FCC correctly noted, the statutory definition of "telecommunications ser-

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[24] 47 U.S.C. § 153(46).

[25] *Random House Webster's Unabridged Dictionary* 1344 (2001).

[26] *See, e.g., Bestfoods v. United States*, 260 F.3d 1320, 1326 (Fed. Cir. 2001) ("[W]e cannot conclude that it was arbitrary or capricious for Customs to consider substantially-transformed ingredients to be products of the country of manufacture, even if the raw materials come from some foreign location."); *McCallum v. City of Athens*, 976 F.2d 649, 657 (11th Cir. 1992) ("[N]either the chlorine nor fluoride in the present case is resold as chlorine or fluoride. Rather the chemicals are combined with water and transformed into an entirely distinct commodity. . . . Undoubtedly, . . . customers believe that they are purchasing water, not chlorine and fluoride.").

[27] *See* Pet. App. 95a-98a (¶¶ 39-41).

[28] *See* Pet. App. 98a (¶ 41) ("we do not believe that the fact that cable modem service is provided over the cable operator's own facilities, without more, necessarily creates a telecommunications service separate and apart from the cable modem service")

vice" turns not "on the particular types of facilities used" but "on the function that is made available."[29]

B. Arguments That the Statute Compels a Different Classification Are Mistaken.

Judge Thomas and the various respondents have relied on a number of disparate arguments supposedly showing that the FCC's interpretation is impermissible as a matter of *Chevron* "Step One." As shown below, each of respondents' arguments fails.

1. Each of these arguments has a common flaw: if credited, they would have the effect of turning all information service providers into providers of "telecommunications service." For example, even dial-up ISPs provide end users a combination of computer processing and data transmission.[30] Yet, as explained above, long-standing FCC policy leaves ISPs and other providers of information services unregulated. Respondents' arguments are facially at odds with that policy.

In an effort to avoid this consequence of their own reasoning, respondents attempt to limit it to ISPs that provide Internet access service *over their own facilities*.[31] That notion, however, has no basis in the statute: as the FCC correctly noted, the definition of "telecommunications service" does not distinguish between facilities-based and

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[29] *See* Pet. App. 90a (¶ 35); *see also id.* 98a (¶ 41) ("the relevant statutory definitions . . . focu[s] . . . on the single, integrated information service that the subscriber to cable modem service receives").

[30] *See generally Report to Congress* ¶ 66 ("Internet service providers typically utilize a wide range of telecommunications inputs.").

[31] *See* CPUC Br. in Opp. at 21 n.8; CPUC Ninth Circuit Br. at 27-28, 31; Earthlink Ninth Circuit Br. at 39 n.12; Brand X Ninth Circuit Br. at 31 n.35; Brand X Ninth Circuit Reply Br. at 18; Earthlink Ninth Circuit Reply Br. 19-20 n.11.

non-facilities-based ISPs. The unintended consequence of respondents' reading and their inability to avoid it in a plausible way indicate that respondents' reading of the statute is unsound.

2. Besides, as shown below, each of respondents' arguments fails on its own. *First*, it has been argued that the FCC read additional words into the statute — particularly, that the definition of "telecommunications service" does not include the words "on a stand-alone basis."[32] This argument has no substance. Whenever statutory language is ambiguous, interpreting its meaning requires the use of additional words — otherwise, one would simply repeat ambiguous words without adding clarity.[33] Here, the FCC used the additional words to explain that "offering telecommunications for a fee directly to the public" means offering telecommunications on a stand-alone basis, rather than as one ingredient in an integrated product.

Second, it has been argued that the "via telecommunications" language in the "information service" definition undermines the FCC's reading. If cable modem service is provided "via telecommunications," the argument goes, it must involve transmission of information "of the user's choosing." That "user," respondents have argued, surely is the subscriber,[34] who for that reason must be offered

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[32] *See, e.g.*, Pet. App. 31a (Thomas, J., concurring); Earthlink Br. in Opp. at 18; CPUC Br. in Opp. at 20.

[33] *See, e.g., Yellow Transp., Inc. v. Michigan*, 537 U.S. 36, 47 (2002) (far from having "insert[ed] words into the statute," agency carried out its duty to "resolve any ambiguities"); *West v. Bowen*, 879 F.2d 1122, 1125, 1128 (3rd Cir. 1989) (rejecting argument that agency had inappropriately "inserted into the statute" additional words, holding agency's interpretation to be "reasonable").

[34] *See* Earthlink Br. in Opp. at 23 ("When an Internet subscriber participates in an on-line auction, posts a message to an electronic

"telecommunications" (and thus receive a "telecommunications service"). As already explained, however, the occurrence of "telecommunications" in the provision of cable modem service does not mean that cable operators offer telecommunications for a fee directly to their subscribers.

Third, it has been argued that legislative history contradicts the FCC's result.[35] Primary reliance is placed on two snippets in the Senate Report saying that (1) "[t]he underlying transport and switching capabilities on which [information services] are based . . . are included in the definition of 'telecommunications services,'" and (2) "'[t]elecommunications service' does not include information services . . . but does include the transmission, without change in the form or content, of such services."[36] These ambiguous snippets are entirely irrelevant: they commented on a definition different from the one that became law.[37]

Finally, it has been argued that Section 706(a) — which calls on "each State commission with regulatory jurisdiction over telecommunications services" to promote "advanced telecommunications capability"[38] — indicates that

bulletin board, or sends an email, it is that subscriber, and nobody else, who determines what information is sent, and where.").

[35] *See* Pet. App. 36a-37a (Thomas, J., concurring); CPUC Br. in Opp. at 22; CPUC Ninth Circuit Br. at 29-30.

[36] *See* S. Rep. No. 104-23, at 18 (1995).

[37] *Id.* at 79.

[38] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, § 706(a) (47 U.S.C. § 157 note) ("The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.").

Congress intended to subject cable modem service to common-carrier regulation.[39] The argument is that cable modem service is a form of "advanced telecommunications capability," and that it would be strange for Congress to address bodies "with regulatory jurisdiction over *telecommunications services*" if cable modem service were not a "telecommunications service." Although Section 706 does address bodies "with regulatory jurisdiction over telecommunications services," that hardly implies that Congress believed that all capabilities promoted are "telecommunications services." To the contrary, Congress may have believed that regulators should stay out of the way precisely because some advanced telecommunications capability might not be telecommunications services.

C. The FCC Did Not Act Arbitrarily by Refusing To Extend Its *Computer II* Policies.

Besides arguing that the statute prohibits the FCC's interpretation, certain respondents have argued that the FCC acted in an arbitrary and capricious manner — in violation of 5 U.S.C. § 706(2)(A) — by failing to adhere to previously adopted *Computer II* policies. The primary argument appears to be that, if cable operators do not "in fact offer transmission service on a stand-alone basis," the FCC should have used the *Computer II* policies to force them to "create a stand-alone transmission service"[40] — either because those policies by their terms apply to cable operators or because the FCC should have extended

[39] *See* CPUC Br. in Opp. at 22-23, 25; CPUC Ninth Circuit Br. at 31-34.

[40] Pet. App. 98a-99a (¶ 42).

them.[41] This set of arguments is wrong too, as the following background makes clear.

1. In the 1960s, technological progress made it possible to use telephone lines to connect mainframe computers to remote terminals. This raised two questions for the FCC: (1) whether computer services made available over telephone lines should be subjected to regulation, and (2) whether the computer-services business should be open to telephone companies.[42] In connection with the former question, the FCC was reluctant to regulate competitive parts of the economy only indirectly related to its communications mandate.[43] On the latter question, the FCC feared that, if telephone companies were permitted to hold a competitive stake in the adjacent industry, they would acquire an incentive to deny computer-services rivals essential telephone inputs, thereby leveraging their market power from the naturally monopolistic telephone industry into the competitive computer-services industry.[44]

In the end, the FCC decided not to regulate the computer-services industry: "enhanced services" (the rough equivalent of today's "information services") would remain unregulated — even though they involved "communications by wire" and were thus within the agency's regulatory jurisdiction.[45] At the same time, the FCC decided that it should permit telephone companies to provide computer services, albeit subject to certain regulatory

[41] *See, e.g.*, Earthlink Br. in Opp. at 19-20; Brand X Br. in Opp. at 25-26; CPUC Br. in Opp. at 24; CPUC Ninth Circuit Reply Br. at 11-12.

[42] *See Computer II* ¶ 16.

[43] *See id.* ¶ 116.

[44] *See id.* ¶¶ 15, 18.

[45] *See id.* ¶¶ 114, 119, 121, 124, 127.

safeguards. In particular, the FCC stated that all "carriers that own common carrier transmission facilities" should continue to make available on tariffed terms the "basic" telecommunications services underlying their "enhanced" computer-related services.[46] That way, computer-service rivals would have equal access to telephone inputs.

Later, the FCC was compelled to add an auxiliary principle: that telephone companies could not avoid the tariffing requirement by adding computer functionality to their basic services. In drawing the line between "basic" and "enhanced," the FCC had held that, whenever a basic service is bundled with an enhanced service, the bundle constitutes an enhanced service.[47] Pointing to this logic, telephone companies sought to liberate themselves from the tariffing requirement by arguing that, if they added enhanced services to basic services, the product was enhanced and therefore unregulated. The FCC disagreed: telephone companies would not be allowed to skirt their pre-existing obligations in this way.[48]

[46] *See id.* ¶ 231 ("those carriers that own common carrier transmission facilities and provide enhanced services . . . must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized"). Except insofar as common carriers owned by AT&T or GTE were concerned, this policy was never formally codified in a regulation. *See id.* at pp. 498-99.

[47] *See, e.g.*, *Independent Data Communications Mfrs. Ass'n, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717, ¶ 18 (CCB 1995) (providers of "enhanced protocol processing services in conjunction with basic transmission services have historically been treated as unregulated enhanced service providers").

[48] *See, e.g.*, *id.* ¶ 44 (contrary rule "would allow circumvention of the *Computer II* and *Computer III* basic-enhanced framework"); *Filing and Review of Open Network Architecture Plans*, Memorandum

2. By its terms, the *Computer II* tariffing requirement applies only to "carriers that own common carrier transmission facilities."[49] The FCC in the order under review interpreted the *Computer II* regime as imposing duties only on "traditional wireline common carriers,"[50] and viewed cable operators as not being encompassed within that term.[51] These determinations — an agency's interpretations of not even its own rules but its own policies — are entitled to an extreme level of deference.[52] And, because cable operators have traditionally not been viewed as being common carriers,[53] it is eminently reasonable to say that cable systems are not "common carrier transmission facilities."

It was similarly reasonable for the FCC to refuse "to extend *Computer II*" to cable operators.[54] As the FCC explained, "the core assumption underlying the *Computer*

Opinion and Order, 4 FCC Rcd 1, ¶ 274 (1988) ("the addition of . . . enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations").

[49] *Computer II* ¶ 231.

[50] *See* Pet. App. 100a (¶ 43); *id.* at 100a n.169 ("By 'wireline,' we refer to services provided over the infrastructure of traditional telephone networks").

[51] *See id.* at 100a (¶ 43) ("The Commission has never before applied *Computer II* to information services provided over cable facilities."); *id.* at 50a, 58a-59a (¶¶ 9, 12) (explaining difference between traditional wireline facilities and cable facilities).

[52] *See, e.g., Auer v. Robbins*, 519 U.S. 452, 461 (1997) (agency's interpretation of its own regulations is "controlling unless plainly erroneous or inconsistent with the regulation") (internal quotation marks omitted).

[53] *See* 47 U.S.C. § 541(c); *United States v. Southwestern Cable Co.*, 392 U.S. 157, 169 n.29 (1968); *Philadelphia Television Broad. Co. v. FCC*, 359 F.2d 282, 284 (D.C. Cir. 1966).

[54] Pet. App. 100a (¶ 43).

Inquiries was that the telephone network is the primary, if not exclusive, means through which information service providers can gain access to their customers."[55] Imposing access requirements on such a network made good sense at a time when telephone companies had unchallenged bottleneck monopoly power that was restrained only by rate-of-return regulation allowing them to earn virtually risk-less returns on investment. By contrast, it makes no sense to extend such requirements to cable operators who invested billions of risk-bearing dollars in upgrading their facilities to offer broadband service in competition with incumbent telephone companies[56] — particularly when, in the FCC's expert view, "broadband services should exist in a minimal regulatory environment,"[57] when that view has spawned robust competition,[58] and when the FCC is considering eliminating *Computer II* altogether.[59]

Contrary to the arguments of respondents,[60] the FCC's refusal to extend *Computer II* to cable operators is not at odds with the "regardless of the facilities used" language in the definition of "telecommunications service."[61] That

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[55] *Id.* at 101a (¶ 44) (emphasis omitted).

[56] *See, e.g., USTA v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002) ("nothing in the Act appears a license to the Commission to inflict on the economy the sort of costs [inherent in imposing access obligations] under conditions where [the Commission has] no reason to think doing so would bring on a significant enhancement of competition").

[57] Pet. App. 47a (¶ 5).

[58] *See supra*, pp. 4-5.

[59] *See* Pet. App. 104a (¶ 47 n.179).

[60] *See, e.g.*, Brand X Br. in Opp. at 26; CPUC Br. in Opp. at 24; Earthlink Ninth Circuit Br. at 42-44; Brand X Ninth Circuit Br. at 32 n.37; Brand X Ninth Circuit Reply Br. at 19; CPUC Ninth Circuit Br. at 36-39; CPUC Ninth Circuit Reply B. at 12, 16.

[61] 47 U.S.C. § 153(46).

language is part of a definition: it demarcates what *is* a "telecommunications service" by making clear that a service otherwise falling within the definition is a "telecommunications service" even if it is provided over non-traditional facilities. The language has no bearing on the question whether an entity providing a service that is not a "telecommunications service" should be forced — through a measure like *Computer II* — to split off the transmission component of the offering and provide that component as a separately regulated "telecommunications service."

II. THE COURT OF APPEALS ERRED CONCERNING THE INTERPLAY BETWEEN *CHEVRON* AND *STARE DECISIS*.

As explained in our petition, this case affords the Court "an opportunity to resolve a conflict of authority concerning the question whether a court of appeals may decline to accord *Chevron* deference to an agency's reasonable interpretation of ambiguous statutory language where a circuit precedent antedating the agency's decision interpreted that language differently."[62] Although the Court does not have to address that question to resolve the case, it is obviously free to manifest its views on the validity of the Ninth Circuit's approach. If it decides to do so, it should state that the Ninth Circuit was wrong.

A. Except Where It Established a Statute's Clear Meaning, This Court's Precedent Does Not Trump *Chevron* Deference.

This Court first addressed the interplay between *Chevron* deference and *stare decisis* in *Maislin Industries, U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116 (1990). The Court there stated: "Once we have determined a statute's clear meaning, we adhere to that determination under the doctrine of *stare decisis*, and we judge an agency's later interpretation of the statute against our prior determination of the statute's meaning."[63] The Court effectively reconciled *Chevron* and *stare decisis* by holding that agencies remain free to exercise their interpretive discretion so long as they do not run afoul of a prior precedent determining the statute's "clear meaning" — *i.e.*, reflecting a *Chevron* "Step One" determination.[64] That constitutes a sensible reconciliation: once this Court has held that a particular interpretation is impermissible, an agency obviously may not embrace it again.[65]

In *Neal v. United States*, 516 U.S. 284 (1996), however, the Court stated: "Once we have determined a statute's meaning, we adhere to our ruling under the doctrine of stare decisis, and we assess an agency's later interpretation of the statute against that settled law." *Id.* at 295. By omitting the word "clear" from the *Maislin* formulation, the Court arguably suggested that even precedent not reflecting a "Step One" determination divests agencies of *Chevron* discretion.

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[62] Pet. 22.

[63] 497 U.S. at 131. The same language is contained in the Court's opinion in *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 536-37 (1992).

[64] The prior precedents at issue in *Maislin* antedated *Chevron*. It has been suggested that the Court should — largely for reasons of practicality — "adopt a blanket presumption that all pre-*Chevron* precedent is step-one precedent." Thomas W. Merrill & Kristin E. Hickman, *Chevron's Domain*, 89 Geo. L.J. 833, 917 (2001); *see also Alexander v. Sandoval*, 532 U.S. 275, 281 n.1 (2001) (noting "the settled principle that decisions . . . declaring the meaning of statutes prior to *Chevron* need not be reconsidered after *Chevron*").

[65] *See United States v. Mead Corp.*, 533 U.S. 218, 248 (2001) (Scalia, J., dissenting) ("in identifying the scope of the statutory ambiguity, . . . the court's judgment is final and irreversible").

Neal should not be read to extend the *Maislin* principle beyond interpretations under *Chevron* Step One — for two reasons. *First*, extending *Maislin* would scarcely make for good judicial policy: it would encourage regulated parties to race to the courthouse in the hopes of obtaining an interpretation by a court of their choosing before the agency has had an opportunity to embody its interpretation of the statute in a *Chevron*-deference-eligible format.[66] *Second*, and more fundamentally, extending *Maislin* would misapprehend *Chevron*. If, as *Chevron* counsels, a statutory silence or ambiguity signals a delegation of legislative authority no different from an express delegation,[67]

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[66] *See, e.g.*, Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1274 (2002) ("Determining regulatory policy by means of such a winner-takes-all race to the courtroom undermines the logic of the administrative state, a logic that delegates flexible decisionmaking power to expert administrators."); Richard W. Murphy, *A "New" Counter-Marbury: Reconciling Skidmore Deference and Agency Interpretive Freedom*, 56 Admin. L. Rev. 1, 25 (2004) ("Even to state this conclusion is to condemn it — it seems absurd to suggest that Congress intended to make allocation of primary control over construction of agency organic statutes turn on a race between agencies and courts."); Russell L. Weaver, *The Emperor Has No Clothes:* Christensen, Mead *and Dual Deference Standards*, 54 Admin. L. Rev. 173, 194 (2002) ("[R]egulated entities may obtain a significant advantage by launching a 'first strike' that deprives the agency of Chevron deference. The net result may be a significant increase in interpretive litigation."); Gregg D. Polsky, *Can Treasury Overrule the Supreme Court?*, 84 B.U. L. Rev. 185, 205 (2004) (*Neal*, read literally, leads to a "nonsensical result, which could never be desired by any rational legislator").

[67] *See Chevron*, 467 U.S. at 843-44 ("If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. Sometimes the legislative delegation to an agency on a particular question is implicit rather than explicit. In such a case, a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency.") (footnote omitted).

deferring to its exercise does not threaten judicial supremacy in "say[ing] what the law is"[68] — no more so than does obeyance to a congressional amendment overruling a judicial interpretation when Congress has retained power to itself.[69]

B. Certainly the Precedent of the Courts of Appeals Cannot Trump *Chevron* Deference.

Whatever may be true with respect to its own precedent, this Court has never suggested that *Chevron* deference can be trumped by the precedent of courts of appeals. To the contrary, on the very issue presented in this case (the proper regulatory classification of cable modem service), this Court's opinion in the *Gulf Power* case indi-

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[68] *Marbury v. Madison*, 1 Cranch 137, 177 (1803).

[69] Merrill & Hickman, 89 Geo. L.J. at 916 ("If Congress has indeed delegated the primary power of interpretation to the agency rather than the courts, then it cannot be true that every judicial interpretation takes precedence over contrary agency interpretations. At least if the issue is one as to which the statute admits of more than one meaning, then the agency interpretation logically should take precedence over the judicial interpretation."); Weaver, 54 Admin. L. Rev. at 192 (allowing *stare decisis* to prevail over deference is "strikingly inconsistent with *Chevron*'s underlying principles"); Bamberger, 77 N.Y.U. L. Rev. at 1319 ("Denying agencies policymaking power when the judiciary rules on an issue first freezes in place decisions made by an institution with an avowedly inferior ability to assess social conditions and without the constitutional capacity to make political choices.") (footnote omitted); Richard J. Pierce, Jr., *Reconciling Chevron and Stare Decisis*, 85 Geo. L.J. 2225, 2258 (1997) (read literally, *Neal* "attach[es] too little significance to the values that are furthered by *Chevron* and by administrative stare decisis, and attach[es] undue significance to the values that are furthered by judicial stare decisis.").

cated that, even after *Portland*, the FCC retained *Chevron* discretion in classifying cable modem service.[70] That understanding was correct: allowing *Chevron* deference to be trumped by the precedent of courts of appeals would have ill-advised consequences well beyond allowing *Chevron* deference to be trumped by the precedent of this Court.[71]

First, allowing lower-court precedent to trump *Chevron* deference would impede uniformity among the circuits. As the Eleventh Circuit has said, it "would wed [one] circuit to [its prior precedent], while all other circuits and the Supreme Court would be bound under *Chevron* to defer to the [agency] rule."[72] In contrast, "[d]eference to the agency's view permits a nationally uniform rule without the need for the Supreme Court to essay the meaning of every debatable [statute]."[73]

Second, allowing lower-court precedent to trump *Chevron* deference would place administrative agencies in an

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[70] *See Gulf Power*, 534 U.S. at 338.

[71] *See* Pierce, I *Administrative Law* § 3.6, at 185 ("[D]ifferential treatment of Supreme Court and circuit court precedents is defensible. It reflects both a recognition of the value of obtaining consistent constructions of national statutes and the unique value of stare decisis at the Supreme Court level."); *Bankers Trust N.Y. Corp. v. United States*, 225 F.3d 1368, 1375 (Fed. Cir. 2000) (noting Government's position that "[d]ecisions of the Supreme Court are an exception").

[72] *Satellite Broad. & Communications Ass'n v. Oman*, 17 F.3d 344, 348 (11th Cir. 1994); *see also* Bamberger, 77 N.Y.U. L. Rev. at 1304 ("[s]uch disharmony fosters circuit splits across the substantive range of regulatory policy"); *Bankers Trust*, 225 F.3d at 1376 ("We recognize that [adhering to circuit precedent] has the effect of creating inconsistency with the outcomes in the parallel cases of the Seventh and Eighth Circuits, discussed above.").

[73] *Homemakers N. Shore, Inc. v. Bowen*, 832 F.2d 408, 412 (7th Cir. 1987) (Easterbrook, J.).

untenable position. Before an agency has a chance to conclude a notice-and-comment rulemaking, courts may reach conflicting decisions. Because obeying each conflicting decision is impossible, the agency must choose between flouting one or more courts' holdings and hoping for a lucky lottery draw, on the one hand, or ceasing national policy formation altogether in deference to the courts, on the other hand. If the agency chooses the latter option, it will "find itself treating similarly situated parties quite differently (and thus unfairly) depending on accidents of geography."[74] Such Balkanization is inconsistent with the very notion of agencies' nationwide regulatory jurisdiction and obligation to establish and enforce uniform national policy.

Finally, allowing lower-court precedent to trump *Chevron* deference would unnecessarily generate appeals to this Court in cases, like that here, in which the statute is ambiguous, the agency's interpretation is reasonable, and the outcome is therefore a foregone conclusion. In such cases, allowing circuit precedent to trump *Chevron* deference would inevitably lead to a result different from the result this Court, which is not bound by circuit precedent, would reach through the application of *Chevron*. Decisions of this Court should not be read to compel lower

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[74] Murphy, 56 Admin. L. Rev. at 12; *see Aguirre v. INS*, 79 F.3d 315, 317 (2d Cir. 1996) (applying *Neal* rule would be contrary to "our frequently expressed concern to avoid disparate treatment of similarly situated aliens under the immigration laws"); *Schisler v. Sullivan*, 3 F.3d 563, 568 (2d Cir. 1993) ("Any other conclusion would result in . . . chaos . . . ."); Pierce, 85 Geo. L.J. at 2243 ("When a circuit court chooses to adhere to a circuit precedent instead of deferring to an agency's reasonable interpretation of ambiguous statutory language, it risks creating a legal environment characterized by unintentional, irrational discrimination.").

courts to commit error. The Ninth Circuit's reading of *Neal* must therefore be wrong.

CONCLUSION

The judgment of the court of appeals should be reversed.

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Nos. 04-277 and 04-281

In the Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Federal Communications Commission had impermissibly concluded that cable modem service is an "information service," without a separately regulated telecommunications service component, under the Communications Act of 1934, 47 U.S.C. 151 *et seq.*

PARTIES TO THE PROCEEDING

The petitioners in No. 04-277 are National Cable & Telecommunications Association, Charter Communications, Inc., Cox Communications, Inc., Time Warner, Inc., and Time Warner Cable, who collectively intervened in support of respondents in the court of appeals. The petitioners in No. 04-281 are the Federal Communications Commission and the United States of America, both of which were respondents in the court of appeals.

Respondents who were petitioners in the court of appeals are: Brand X Internet LLC, the National League of Cities, the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National Association of Counties, the Texas Coalition of Cities for Utility Issues, Earthlink, Inc., GTE.Net LLC d/b/a/ Verizon Internet Solutions, Verizon Internet Services, Inc., Verizon Telephone Companies, Consumer Federation of America, Consumers Union, Center for Digital Democracy, People of the State of California *ex rel.* Bill Lockyer, the Public Utilities Commission of the State of California, Buckingham Township, Conestoga Township, East Hempfield Township, Martic Township, and Providence Township.

Respondents who were intervenors in the court of appeals below are: WorldCom, Inc., AT&T Corp., Competitive Telecommunications Association, Vermont Public Service Board, the Information Technology Association of America, Focal Communications Corporation, Vermont Public Service Board, the State of Vermont, the Vermont Department of Public Service, Utility, Cable & Telecommunications Committee of the City Council of New Orleans, Association of Communications Enterprises, the City and County of San Francisco, SBC Communications Inc., BellSouth Corporation, and BellSouth Telecommunications, Inc.

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In the Supreme Court of the United States

No. 04-277

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

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BRIEF FOR THE FEDERAL PETITIONERS

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a)[1] is reported at 345 F.3d 1120. The declaratory ruling and notice of proposed rulemaking of the Federal Communications Commission (Pet. App. 40a-203a) is reported at 17 F.C.C.R. 4798.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 2003. Petitions for rehearing were denied on March 31, 2004 (Pet. App. 204a-207a). On June 16, 2004,

[1] Pet. App. refers to the corrected appendix to the petition for a writ of certiorari in No. 04-281.

Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including July 29, 2004, and on July 20, 2004, Justice O'Connor further extended the time within which to file a petition for a writ of certiorari to and including August 30, 2004. The petition for a writ of certiorari in No. 04-281 was filed on August 27, 2004, and the petition for a writ of certiorari in No. 04-277 was filed on August 30, 2004. The petitions were granted and the cases were consolidated on December 3, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Communications Act of 1934, 47 U.S.C. 151 *et seq.*, are reproduced in the appendix to the petition in No. 04-281. Pet. App. 208a-213a.

STATEMENT

In the decision under review in this case, the Federal Communications Commission concluded that broadband Internet access service provided to residential subscribers over cable facilities—an offering known as "cable modem" service, see Pet. App. 86a—should be classified as an "information service" and not a "telecommunications service" subject to a variety of common-carrier regulations under Title II of the Communications Act. That conclusion was in keeping with the core federal policy in place since the 1990s of reducing regulatory impediments to the rapid deployment of broadband (*i.e.*, "high-speed") Internet access services. See Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56 (goal of the 1996 Act is "to promote competition and reduce regulation in order to * * * encourage the rapid deployment of new telecommunications technologies," such as the Internet). The Ninth Circuit rejected the Commission's regulatory classification without evaluating the substance of the agency's decision or applying the deferential framework of *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Instead, the court held that stare decisis compelled adherence to its own circuit precedent—dating from *before* the FCC decided the issue—which classified cable modem service as partly an information service and partly a telecommunications service. See *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000).

1. The Communications Act does not mention cable modem service or expressly state how the Commission should classify and regulate that service. The dispute over that classification issue centers around the interpretation of three terms in the Communications Act—"telecommunications," "telecommunications service," and "information service."

a. "Telecommunications," a basic term in the Act, is defined as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43). "Telecommunications" is thus the unaltered transmission of information. Building on the definition of "telecommunications," the Act defines "telecommunications service" as the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46). Thus, a "telecommunications service" involves more than the mere transmission of information; it requires the "offering" of pure transmission capability "for a fee directly to the public."

Providers of interstate telecommunications service (*i.e.*, "telecommunications carriers," see 47 U.S.C.

153(44)) are generally subject to substantial regulation as common carriers under Title II of the Communications Act, 47 U.S.C. 201 *et seq.* See *Virgin Islands Tel. Corp.* v. *FCC*, 198 F.3d 921, 926-927 (D.C. Cir. 1999).[2] As Title II common carriers, telecommunications carriers generally can be held liable for damages if their rates or terms of service are later found to be unjust, unreasonable, or unreasonably discriminatory. See 47 U.S.C. 201-209. They must also comply with numerous federal obligations, such as the requirement that they contribute to federal programs that support universal service policies, see 47 U.S.C. 254, and to design their networks to ensure interconnectivity with the networks of other carriers, see 47 U.S.C. 251(a).

b. The Act defines "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). The Communications Act generally does not impose regulatory obligations on providers of information services. See Pet. App. 6a, 14a. The Commission does have jurisdiction over information services under Title I of the Communications Act, 47 U.S.C. 151-161, which provides the agency authority over interstate and foreign communications. See 47 U.S.C. 151, 152(a); see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-168 (1968). The Commission, however, has traditionally refrained

[2] Providers of telecommunications that offer their services on an individualized, contract basis are considered private carriers. *Virgin Islands Tel. Corp*, 198 F.3d at 926-927. Private carriers are not regulated as common carriers under Title II, although the Act authorizes the Commission to impose some Title II requirements on them, see, *e.g.*, 47 U.S.C. 254(d) (universal service contributions), and the Commission has done so, see 47 C.F.R. 54.706(b).

from exercising its Title I authority to regulate information services. See Pet. App. 138a.[3]

2. In 1998, the Commission analyzed and interpreted those statutory terms and discussed their application to Internet service providers (ISPs) in its *Universal Service Report* to Congress. *In re Federal-State Joint Bd. On Universal Serv.*, 13 F.C.C.R. 11,501 (1998). The Commission noted that a "telecommunications service" is the "offering of telecommunications for a fee directly to the public," and the item offered to the public—"telecommunications"—must be a "transmission * * * of information * * * without change in the form or content of the information as sent and received." *Id.* at 11,520 ¶ 39 (quoting 47 U.S.C. 153(43)). An information service, by contrast, generally *does* result in a change to the form or content of the transmitted information in some manner. See *id.* at 11,521 n.79 ("A service that generates, acquires, transforms, processes, retrieves, utilizes or makes available information is by definition not merely transmitting the user's informa-

[3] In the agency proceeding below, certain parties argued that cable modem service falls within an additional service category under the Communications Act—the category of "cable service." See 47 U.S.C. 522(6) (defining "cable service" as "(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service"). Such a classification would subject cable modem service to franchising obligations that localities may impose on cable operators under 47 U.S.C. 541. The Commission concluded that cable modem service is not a cable service. Pet. App. 118a-132a. The Ninth Circuit affirmed that aspect of the Commission's decision. Pet. App. 21a-22a. In No. 04-460, this Court denied a cross-petition for certiorari seeking review of the court of appeals' decision that cable modem service is not a cable service. That issue is therefore not before the Court.

tion without change."). Therefore, the Commission concluded, the categories of "telecommunications service" and "information service" are "mutually exclusive." *Id.* at 11,520, 11,521, 11,530 ¶¶ 39, 43, 59. An entity offers telecommunications "only when the entity provides a transparent transmission path, and does not 'change . . . the form and content' of the information." *Id.* at 11,521 ¶ 41. An entity that instead offers subscribers the ability to acquire, store, transform, and manipulate information "via telecommunications" is not offering "telecommunications" as defined in the 1996 Act, but is instead merely *using* telecommunications to offer an information service. *Ibid.*

The Commission rejected arguments that the telecommunications component of an information service should be isolated and viewed separately as an offering of telecommunications under the Act. 13 F.C.C.R. at 11,520 ¶ 40. Instead, the Commission concluded that the determination whether a particular offering should be classified as a "telecommunications service" will depend on the "nature of the service that is being offered to consumers," *id.* at 11,530 ¶ 59, in keeping with that definitional provision's focus on the nature of the "offering * * * to the public." 47 U.S.C. 153(46). If consumers are offered "two distinct services," one consisting of "nothing more than pure transmission" and the other consisting of "enhanced functionality," the Commission concluded that the transmission service would constitute an offering of telecommunications under the Act, while the service offering enhanced functionality would be classed as an information service. *Id.* at 11,530 ¶¶ 59-60. In contrast, where consumers are offered a "mixed or hybrid service" that combines "a single information service with communications and computing components," *id.* at 11,530 ¶¶ 56, 60, that offering would be classified solely as an information service under the Act. *Id.* at 11,529 ¶¶ 56-57.

Applying the *Universal Service Report* analysis to Internet access services, the Commission determined that traditional Internet service providers (ISPs) (*i.e.*, ISPs that do not own transmission facilities but lease lines or acquire telecommunications from third parties) are information service providers under the Act, not telecommunications service providers. 13 F.C.C.R. at 11,536 ¶ 73. The Commission found that such ISPs typically offer a variety of applications and services, including Internet browsing, e-mail, and web hosting, that provide subscribers with information service capabilities, which, taken together, form an integrated Internet access service. *Id.* at 11,537 ¶ 76, 11,539 ¶ 79. The Commission recognized that the "provision of Internet access services involves data transport elements," because an ISP must "enable the movement of information between customers' own computers and the distant computers [*e.g.*, servers on the Internet] with which those customers seek to interact." See, *e.g.*, *id.* at 11,539-11,540 ¶ 80. Nonetheless, in keeping with the foregoing statutory analysis, the Commission reaffirmed its prior determination that "the 1996 Act's definition of telecommunications, which 'only includes transmissions that do not alter the form or content of the information sent,' excludes Internet access services, which 'alter the format of information through computer processing applications.'" *Id.* at 11,516 ¶ 33; see also 13 F.C.C.R. at 11,536 ¶ 73, 11,540 ¶ 80.

Moreover, the Commission explained, classifying traditional ISPs as solely providers of information services under the Communications Act ensures that they will not be subject to the regulatory obligations of common carriers. 13 F.C.C.R. at 11,540 ¶ 82. The Commission

expressed concern that imposing such obligations on traditional ISPs would "effect[] a major change in the regulatory treatment of [Internet] services" and "could seriously curtail the regulatory freedom" that the Commission considered "important to the healthy and competitive development" of the industry. *Id.* at 11,524 ¶¶ 44-45. The Commission emphasized that it would not lightly "presume that legacy regulatory frameworks" (*i.e.*, those developed in the context of traditional telephone service) are appropriate for services that take advantage of "the unique qualities of the Internet." *Id.* at 11,540 ¶ 82.

3. In the *Universal Service Report*, the Commission did not resolve the regulatory classification of "cable operators providing Internet access," 13 F.C.C.R. at 11,535 n.140, or other information service providers that provide service using their own transmission facilities, see *id.* at 11,530 ¶ 60. Likewise, in other proceedings, the Commission recognized the evolving nature of the broadband industry and declined to make definitive pronouncements concerning the regulatory classification of broadband services generally, and cable modem service in particular. See Pet. App. 43a-46a. For instance, in a proceeding involving pole attachment rates under 47 U.S.C. 224(e)(1), the Commission tentatively concluded that Internet services provided over cable facilities are not telecommunications services under the Act, but found it unnecessary to make a final decision regarding the classification of such services.[4] In

[4] See *In re Implementation of Section 703(e) of the Telecommunications Act of 1996: Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 F.C.C.R. 6777, 6794-6796 ¶¶ 33-34 (1998), aff'd in part and vacated in part *sub nom. Gulf Power* v. *FCC*, 208 F.3d 1263 (11th Cir. 2000), rev'd *sub nom.*

National Cable & Telecommunications Ass'n v. *Gulf Power Co.*, 534 U.S. 327 (2002), this Court stated that the Commission had "proceeded in a sensible fashion" in electing to avoid answering "hard questions" about the proper classification of cable modem service "when easier ones are dispositive." *Id.* at 337, 338.

4. Meanwhile, the Ninth Circuit addressed the regulatory classification of cable modem service in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (2000). The Commission participated as amicus curiae and suggested that the court could resolve the specific question before it—namely, whether a local government could require a cable franchisee to provide unaffiliated ISPs access to its cable modem facilities—without deciding whether cable modem service includes a telecommunications service component. See Br. of the FCC as Amicus Curiae at 19, 31, *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (9th Cir. 2000) (No. 99-35609).[5] The Ninth Circuit, however, resolved the case on the basis of its own classification of cable modem service. The

National Cable & Telecomm. Ass'n v. *Gulf Power*, 534 U.S. 327 (2002) (*Gulf Power*).

[5] The Fourth Circuit adopted just such a narrow approach in *MediaOne Group, Inc.* v. *County of Henrico*, 257 F.3d 356 (2001). In that case, the court addressed a challenge to a local access requirement similar to the one at issue in *Portland*. The Fourth Circuit resolved the controversy by concluding that the local access requirement was unlawful because it required the cable operator to provide a "telecommunications facility" in violation of 47 U.S.C. 541(b)(3)(D). 257 F.3d at 363. The Fourth Circuit observed that the question of the proper classification of cable modem service "is complex and subject to considerable debate" and that the "outcome will have a marked effect on the provision of Internet services." *Id.* at 365. The Fourth Circuit accordingly concluded that resolution of the classification issue should be left "to the expertise of the FCC." *Ibid.*

court rejected the mutual view of both the cable operator and the localities in *Portland* that cable modem service is a "cable service" subject to local franchising requirements under the Communications Act. See note 3, *supra*. Instead, the Ninth Circuit concluded, based on its own analysis of the Communications Act, that cable modem service is an information service to the extent the provider acts as a "conventional ISP," but a telecommunications service to the extent the provider offers Internet transmission over the cable broadband facility. 216 F.3d at 878. Because the Communications Act prohibits localities from imposing conditions on the provision of telecommunications services by cable operators, the court reasoned, the local governments' network-access condition was unlawful. *Ibid.* (citing 47 U.S.C. 541(b)(3)).

5. In September 2000, the Commission initiated a comprehensive proceeding to "develop a national legal and policy framework" to govern the classification of cable modem service." *In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities* (*Cable Modem NOI*) 15 F.C.C.R. 19,287, 19,288 ¶ 2 (2000). In the course of that proceeding, the Commission reviewed approximately 250 comments and engaged in numerous discussions with "industry representatives, consumer advocates, and state and local government[s]." Pet. App. 9a.

On March 15, 2002, the Commission issued the declaratory ruling under review in this case, concluding that cable modem service "as it is currently offered" is neither a cable service nor a telecommunications service under the Communications Act, but solely an inter-

state information service. Pet. App. 48a; see *id.* at 88a.[6] The Commission stated that its analysis of cable modem service was "guided by several overarching principles," *id.* at 46a, including the statutory goal of encouraging "the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" and the Commission's policy goal of minimizing "regulatory uncertainty" and "unnecessary and unduly burdensome regulatory costs" in order to foster "investment and innovation" in broadband services. *Id.* at 47a. The Commission also sought to create "a rational framework for the regulation of competing services that are provided via different technologies" and to develop "an analytical approach that is, to the extent possible, consistent across multiple platforms." *Id.* at 48a.

With those considerations informing its analysis, the Commission concluded that cable modem service should be classified as an information service under the Communications Act and not as a telecommunications service. The Commission observed that the Communications Act "does not clearly indicate how cable modem service should be classified or regulated," and that the "technologies and business models used to provide cable modem service are * * * complex and still evolving." Pet. App. 87a. Applying the framework it had developed in the *Universal Service Report*, see *id.* at 91a-94a, the Commission determined that it should

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[6] The Commission acknowledged the inconsistency with the *Portland* decision, Pet. App. 114a, but noted that the Ninth Circuit in *Portland* had relied on a case record "that was less than comprehensive," and that the parties in *Portland* (having agreed that cable modem service should be regulated as a cable service) had not addressed the possible classification of cable modem service as an information or telecommunications service. *Id.* at 115a.

classify cable modem service as an information service because cable modem offers subscribers functions "commonly associated with Internet access." *Id.* at 93a-95a. The Commission rejected as a factual matter arguments that cable modem service, as currently provided, includes a discrete offering of telecommunications service to subscribers. *Id.* at 95a-96a. The Commission determined that the transmission component of cable modem service is not offered in a manner that renders it "separable from the data-processing capabilities of the service"; "[a]s provided to the end user[,] the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Id.* at 96a. The Commission rejected the contention that cable operators' use of their own facilities to provide cable modem service requires a different result. *Id.* at 98a.[7]

5. Various parties petitioned for review of the Commission's decision in the Third, Ninth, and D.C. Circuits. After a judicial lottery conducted under 28 U.S.C. 2112(a)(3), the Ninth Circuit was selected to review the agency's decision. Pet. App. 10a-11a. Seven petitions for review challenging the Commission's cable modem classification order were consolidated in that court.

In a per curiam opinion, the Ninth Circuit vacated the Commission's determination that cable modem

[7] In a notice of proposed rulemaking accompanying its classification decision, the Commission requested comment on whether it should use its Title I or other authority to compel cable operators to offer the transmission capabilities they use in connection with their cable modem service to unaffiliated ISPs. See Pet. App. 134a ("[W]e consider whether * * * to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly."). That rulemaking proceeding is currently pending.

service is solely an information service under the Communications Act. The court of appeals considered itself bound by stare decisis to enforce *Portland*'s classification of cable modem service as a bifurcated information and telecommunications service, notwithstanding the Commission's intervening contrary interpretation of the Act in the order on review. Pet. App. 12a-22a. The court acknowledged that the "FCC is the agency Congress has charged with the administration of the Communications Act," and that, under *Chevron*, "[w]here the agency's interpretation of the statute [it administers] is reasonable, the court must defer." *Id.* at 11a. The court, however, read Ninth Circuit case law to preclude adherence to *Chevron* here, because *Portland* itself did not involve "deferential review of [agency] decisionmaking" or expressly state that the Communications Act is ambiguous about the correct classification of cable modem service. *Id.* at 18a, 19a (citing *Mesa Verde Constr. Co.* v. *Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1134-1135 (9th Cir. 1988) (en banc)). The court concluded that *Portland* foreclosed the Commission's determination that cable modem service is solely an information service with no separate telecommunications service component. *Id.* at 21a-22a.

Judges O'Scannlain and Thomas filed concurring opinions. Judge O'Scannlain observed that the panel's adherence to stare decisis produced a "strange result": "three [Ninth Circuit] judges telling an agency acting within the area of its expertise that its interpretation of the statute it is charged with administering cannot stand—and that [the *Portland* panel's] interpretation of how the Act should be applied to a quicksilver technological environment is the correct, indeed the only, interpretation." Pet. App. 24a-25a (citation and internal quotation marks omitted). Judge O'Scannlain noted

that the panel's decision was "strikingly inconsistent with *Chevron*'s underlying principles." *Id.* at 22a (citation omitted). Nonetheless, Judge O'Scannlain joined the panel's opinion because he thought himself constrained by circuit precedent to follow *Portland*'s classification of cable modem service. *Id.* at 25a.

Judge Thomas, the author of the *Portland* opinion, stated in his separate concurrence that he would have reached the same conclusion "even if [the panel] were writing on a clean slate." Pet. App. 39a. In his view, the statute "compels the conclusion" that cable modem service is in part a telecommunications service. *Id.* at 25a.

6. On March 31, 2004, the court of appeals denied petitions for rehearing en banc, with Judge O'Scannlain voting to grant rehearing en banc. Pet. App. 205a-207a.

SUMMARY OF ARGUMENT

I. The Communications Act does not directly address the classification of cable modem service. In the face of that statutory silence, the FCC reasonably concluded after careful study that cable modem service is properly classified as an "information service," without a separately regulated "telecommunications service" component, for purposes of the Communications Act.

A. The Commission's construction follows from three basic premises: First, the Commission found that cable modem service should be classified, along with traditional ISPs, as an information service. The Commission had previously concluded that traditional forms of Internet access service generally are "information services" under the Act, because Internet access service provides the "capability" for each of the activities in the statutory definition—"generating, acquiring, storing, transforming, processing, utilizing, or making available

information," 47 U.S.C. 153(20). In this proceeding, the Commission reasonably concluded that cable modem service, which is at its heart simply another form of Internet access service, should be classified in the same way.

Second, the Commission found that, insofar as cable modem service is an information service, it is not a telecommunications service. The Commission had previously concluded that an information service (such as traditional Internet access) is not itself a telecommunications service, and indeed that the two categories are mutually exclusive. The Commission particularly noted, *inter alia*, that because "telecommunications" by definition involves "transmission * * * *without change* in the form or content" of the information transmitted, 47 U.S.C. 153(43) (emphasis added), it is better characterized as "pure transmission," whereas an information service involves the general capability for changing the form or content of information. In this proceeding, the Commission reasonably applied that conclusion to cable modem service, which, like other Internet access services, *does* involve the capability to "change * * * the form or content" of information.

Finally, the Commission reasonably concluded that cable modem service is not a combination of distinct information and telecommunications services. Under the Act, "telecommunications service" is defined exclusively as an "*offering of telecommunications* for a fee directly to the public." 47 U.S.C. 153(46) (emphasis added). Cable modem service, however, is not offered as the "pure transmission" capacity that constitutes telecommunications, because cable modem service offers subscribers such transmission capacity only in connection with the capability for corresponding "change[s] in form or content" that occur in the course

of Internet access. The Commission therefore reasonably determined that cable modem service does not involve an "offering" of telecommunications (*i.e.*, pure transmission capacity) to the public. Nothing in the Communications Act precludes that determination; Congress clearly left to the Commission the task of reasonably construing the statutory terms to achieve the goals and policies of the Act.

B. In this case, the Commission exercised the authority delegated to it by Congress to construe the Communications Act in accordance with its expert understanding of a "technical, complex, and dynamic" subject, *Gulf Power*, 534 U.S. at 339, and in furtherance of the strong federal policy of fostering the growth of broadband Internet access services. Classifying cable modem service as a telecommunications service would drastically change the regulatory environment for cable modem service. Cable modem providers would be subject to common carrier pricing and filing requirements; they would face new financial obligations, such as contributions to universal service and other funds; and they could face as well a series of new engineering and operational obligations associated with their status as telecommunications carriers. Those costs could lead them to raise prices or forego new investment, particularly in rural and underserved areas. The Commission in this case reasonably applied the relevant definitions in the Act in a manner that advances the crucial federal policy of encouraging the availability of broadband Internet access.

C. The arguments advanced by respondents below and by Judge Thomas in his concurring opinion should be rejected. Their contention that the Commission has improperly allowed cable operators to "escape" from

sue in this case is whether cable operators providing cable modem service are subject to those obligations in the first place. In addition, respondents and Judge Thomas contend that the Commission's decades-old policy requiring telephone companies to separate out their traditional common carrier offerings from their computer offerings mandates adoption of a similar policy here. But the Commission explained that its "legacy" framework developed in an era that was dominated by common carrier monopolists in the telephone industry should not be casually applied to the entirely different structure and circumstances of the modern cable modem industry, whose participants have not historically been viewed as common carriers. Nor is there any basis for concluding that Congress codified —and froze—the Commission's legacy regulatory framework when it enacted the 1996 Act.

II. The Ninth Circuit refused even to consider whether the Commission's decision was reasonable under *Chevron* standards, because it concluded instead that the Commission was obliged to follow the Ninth Circuit's own prior construction of the Communications Act in *Portland*. The Ninth Circuit's misguided no-deference view should be rejected.

Most fundamentally, the Ninth Circuit's rule is inconsistent with *Chevron*'s recognition that Congress has delegated to the agency—not the courts of appeals—the primary authority to resolve statutory ambiguities. No decision of this Court requires adoption of the Ninth Circuit's approach, which would subject a single agency decision to differing standards of review, thereby producing unseemly races to the courthouse, unnecessary conflicts in the circuits, and unfortunate situations in which (absent this Court's review) the

termined for the entire Nation by lone three-judge panels. The Ninth Circuit's partial abrogation of *Chevron* should be overturned.

ARGUMENT

I. THE COMMISSION REASONABLY CONCLUDED THAT CABLE MODEM SERVICE SHOULD BE CLASSIFIED AS AN INFORMATION SERVICE AND NOT A TELECOMMUNICATIONS SERVICE FOR PURPOSES OF THE COMMUNICATIONS ACT

As this Court has recognized, Congress was "well aware that the ambiguities it [chose] to produce" in drafting the 1996 Act "will be resolved by the implementing agency," *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999), and Congress therefore delegated to the Commission the "authority to fill gaps where the statutes are silent," *Gulf Power*, 534 U.S. at 338-339. The Commission's decision that cable modem service should be classified as an information service and not as a telecommunications service for purposes of the Communications Act is an exercise of that delegated responsibility and should be upheld as a "permissible construction of the statute." *Chevron*, 467 U.S. at 843. The Commission's classification is consistent with the text of the Act, and it promotes Congress's policy goal of "encouraging the ubiquitous deployment of broadband to all Americans." 1996 Act § 706, 110 Stat. 153.

A. The Commission Reasonably Construed The Statutory Terms To Find That Cable Modem Service Is Solely An Information Service Under The Communications Act

The question presented in this case arises out of the interpretation of the Communications Act's interre-

lated definitions of three terms: "telecommunications," "telecommunications service," and "information service." In this case, the Commission reasonably and consistently construed those terms in concluding that (a) cable modem service is an information service, (b) insofar as cable modem service is an information service, it is not a telecommunications service, and (c) cable modem service does not involve distinct information and telecommunications services. The Commission's reasonable application of the Act's definitions to cable modem service should be affirmed.

1. *The FCC reasonably classified cable modem service as an information service.*

a. The Act defines an "information service" as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). In 1998, in the *Universal Service Report*, the Commission examined the general question of the proper classification of the service provided by traditional ISPs and concluded that they provide an information service for purposes of the Communications Act. 13 F.C.C.R. at 11,536 ¶ 73. The Commission found that ISPs offer their subscribers a variety of clients and services that "combine computer processing, information provision, and other computer-mediated offerings with data transport." *Ibid.* Examining each of the major applications—"World Wide Web browsers, FTP clients, Usenet newsreaders, electronic mail clients, Telnet applications, and others," *id.* at 11,537 ¶ 76 (footnotes omitted)—that are made possible by Internet access service, the Commission concluded that each falls comfortably within the Act's definition of information service. *Id.* at 11,537-11,539 ¶¶ 76-78.

The Commission also found that "[m]ore generally, * * * it would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status" and could fall within distinct legal classifications under the Act. 13 F.C.C.R. at 11,539 ¶ 79. Rather, the Commission concluded, "[t]he service that Internet access providers offer to members of the public is Internet access" itself, which allows for each of those information processing capabilities. *Ibid.* That combined offering, the Commission reasonably found, "is appropriately classed as an 'information service.'" *Id.* at 11,540 ¶ 80.

b. Although the Commission generally concluded in the *Universal Service Report* that ISPs provide an information service, the Commission "express[ed] no view * * * on the applicability of this analysis to cable operators providing Internet access service." 13 F.C.C.R. at 11,535 n.140. In the instant proceeding, however, the Commission found that cable modem service, like other forms of Internet access service, "combines the transmission of data with computer processing, information provision, and computer interactivity, enabling end users to run a variety of applications." Pet. App. 94a. The result is to offer users capabilities involving "[access to unique] content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web." *Id.* at 52a-54a (footnotes omitted); see *id.* at 91-93a. Accordingly, the Commission concluded that, under the analysis in the *Universal Service Report*, cable modem service is an information service.

The court below agreed that cable modem service is, at least in part, an information service. See Pet. App.

14a-15a. So did the parties that challenged the FCC's order in this case. *Id.* at 10a ("None of the petitioners [who sought review in the court of appeals] challenge the FCC's conclusion that cable modem service is an information service.").

2. The FCC reasonably determined that, insofar as cable modem service is an information service, it is not a telecommunications service.

a. In the *Universal Service Report*, the Commission also considered the application to Internet access service of the categories of "telecommunications" and "telecommunications service" under the Act. The Commission recognized that "[b]ecause information services are offered 'via telecommunications,' they necessarily require a transmission component in order for users to access information." 13 F.C.C.R. at 11,529 ¶ 57. The Commission nonetheless reasonably concluded that such use of transmission capabilities does not compel classification of information service providers as providers of telecommunications service.

"Telecommunications" is defined as the "transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43). In the *Universal Service Report*, the Commission reasoned that the purpose of the "without change" clause "is to ensure that an entity is *not* deemed to be providing 'telecommunications,' notwithstanding its transmission of user information, in cases in which the entity is altering the form or content of that information." 13 F.C.C.R. at 11,521 ¶ 40. As the Commission explained, whereas an offering of telecommunications necessarily involves the provision of a "transparent" transmission path, *id.* at 11,520 ¶ 39, or

"pure transmission," *id.* at 11,536 ¶ 73, the hallmark of an information service under the Act is that the provider "is by definition not merely transmitting the user's information without change," *id.* at 11,521 n.79.

Because the term "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public," 47 U.S.C. 153(46), the Commission concluded in the *Universal Service Report*—consistent with the relevant regulatory and legislative background, see 13 F.C.C.R. at 11,516-11,525 ¶¶ 33-46—that "the categories of 'telecommunications service' and 'information service' in the 1996 Act are mutually exclusive." *Id.* at 11,520 ¶ 39; see also *id.* at 11,521, 11,530 ¶¶ 43, 59. Thus, "an entity offering a simple, transparent transmission path, without the capability of providing enhanced functionality, offers 'telecommunications.'" *Id.* at 11,520 ¶ 39. But "[b]y contrast, when an entity offers transmission incorporating" the active information-processing capabilities of an information service, "it does not offer telecommunications. Rather, it offers an information service, even though it uses telecommunications to do so." *Ibid.* Because Internet access service incorporates such active, information processing capabilities, the Commission reasonably concluded that Internet access service is not a telecommunications service.

b. In the instant proceeding, the Commission applied that analysis to cable modem service. As with ISPs generally, the Commission recognized that "cable modem service provides the capabilities [of an information service] 'via telecommunications.'" Pet. App. 96a. But, just as with other ISPs, the fact that the cable modem service employs telecommunications does not make it a telecommunications service. Because cable modem service, like the service of other ISPs, offers active, information-processing functionality, the Commission reasonably concluded that "cable modem service as currently provided is an interstate information service." *Id.* at 88a.

3. *The FCC reasonably determined that cable modem service is not a combined offering of distinct information and telecommunications services.*

The court of appeals in *Portland* concluded that cable modem service consists of two distinct services. The court held that "[t]o the extent [the cable operator] is a conventional ISP, its activities are that of an information service," but "to the extent that [the cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." 216 F.3d at 878; see Pet. App. 15a. The Commission reasonably rejected that argument, which relies principally on the fact that a cable modem service provider, unlike some other ISPs, "provides an information service over its own transmission facilities." *Id.* at 97a-98a; see *id.* at 38a (Thomas, J., concurring).

a. As the Commission recognized, the question whether a particular service constitutes a "telecommunications service" under the Communications Act must be resolved by reference to the nature of the provider's "offering * * * to the public," 47 U.S.C. 153(46), and thus the classification "turns on the nature of the functions that the end user is offered." Pet. App. 94a. "As provided to the end user," the "telecommunications component" of cable modem service is not offered "separa[tely] from the data-processing capabilities of the service," but "is part and parcel of" the service being offered. *Id.* at 96a. Thus, "the transmission of in-

formation to and from" the cable operator's "computers may constitute telecommunications," as does the transmission of information in connection with a traditional ISP or other information service. *Id.* at 96a-97a. But, because the cable operator does not *offer* transparent transmission capacity in such a way that the subscriber can use it *without* a corresponding change in the form or content of the information transmitted, the cable operator is not providing a telecommunications service. As the Commission reasonably concluded, "[a]n offering that constitutes a single service from the end user's standpoint" need not be divided into its component parts so as to include a telecommunications service "simply by virtue of the fact that it involves telecommunications components." *Universal Service Report*, 13 F.C.C.R. at 11,529 ¶ 58.

To be sure, if a cable modem service provider made a "stand-alone offering of transmission for a fee directly to the public," Pet. App. 97a, such that subscribers could pay for and use the transmission without the information service capabilities that go along with Internet access service, then such a provider might well be "offering" telecommunications and thus providing a telecommunications service. But the Commission was "not aware of any cable modem service provider that has made [such] a stand-alone offering." *Ibid.* Accordingly, the Commission reasonably determined that, as "currently provided," *id.* at 88a, cable modem service is not a combination of two distinct services.

The Commission also validly concluded that "the fact that cable modem service is provided over the cable operator's own facilities" does not, "without more, necessarily create[] a telecommunications service separate and apart from cable modem service." Pet. App. 98a. The Commission reasonably determined that cable mo-

dem service is properly classified as a "single, integrated information service" for purposes of the Communications Act, with no separate telecommunications service offering to subscribers. *Ibid.*; see *id.* at 95a-96a n.154. Like traditional ISPs, "[t]he cable operator providing cable modem service over its own facilities * * * is not offering telecommunications service to the end user, but rather is merely using telecommunications to provide end users with cable modem service." *Ibid.*[8] The end user of the service is indifferent to the extent to which an access provider—be it a cable or traditional ISP—is using its own facilities. Nothing in the Communications Act required the Commission to break down that single service into conceptually distinct components for regulatory purposes and

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[8] The Ninth Circuit's conclusion in *Portland* that the transmission component of cable modem service is a separate telecommunications service is based on a flawed analogy between cable modem service and conventional "dial-up" Internet access service. It is true that both "dial-up" service and cable modem service involve telecommunications between the user and the service provider's computers. In "dial-up" service, that telecommunications is provided by the telephone company as part of its "plain old telephone service," while the information service is provided by the ISP; accordingly, there is a distinct "offering" of telecommunications, which constitutes a "telecommunications service." But the *Portland* court erred in assuming that, because the telephone company offers a separate telecommunications service in the case of dial-up Internet access, cable modem operators must also offer a telecommunications service to connect to the Internet. Because cable modem service may reasonably be classified under the Communications Act as "a single information service with Communications and computing components," *Universal Service Report*, 13 F.C.C.R. at 11,530 ¶ 60, there is no "offering" of telecommunications and therefore no "telecommunications service" under the Act. See Pet. App. 95a-96a n.154.

analyze each to determine its proper legal classification under the Act.

b. Judge Thomas in his concurring opinion below contended that the Commission's conclusion is inconsistent with "the full statutory definition" of the terms involved. Pet. App. 30a; see States Opp. 20-21; Earthlink Opp. 14-15. That contention is mistaken. As explained above, the Commission's conclusions were based on a careful examination of the statutory terms and their context. In the first place, the extent to which potentially overlapping statutory terms are mutually exclusive and the proper classification of "mixed" services are precisely the kinds of questions left to the agency under *Chevron*. Cf. *Chevron*, 467 U.S. at 862 (statutory language ambiguous when "the terms are overlapping and the language is not precisely directed to the applicability of a given term in the context of a larger operation"). In any event, the Commission's construction best gives effect to the statutory terms and the "mutually exclusive" nature of telecommunications service and information service, and is therefore "most faithful" to the 1996 Act and its "policy goals of competition, deregulation, and universal service." *Universal Service Report*, 13 F.C.C.R. at 11,530 ¶ 59. Given that the Act's definition of "information service" expressly contemplates a "telecommunications" component, whereas the definition of "telecommunications service" does not similarly contemplate an information service component, the regulatory necessity of placing "offering[s]" in one mutually exclusive category or the other amply justifies the FCC's decision to place "mixed" or "hybrid" services like cable modem service on the information services side of the line. *Id.* at 11,530 ¶¶ 59-60; see Pet. App. 95a-98a.

To be sure, Congress could have framed the Act's definitions in a variety of ways that would have resolved the question in this case. For example, Congress could have enacted an earlier proposed version of the provision that became Section 153(46), under which "telecommunications service" would have included "the transmission, without change in the form or content, of information services and cable services," but not "the offering of those [information or cable] services." See S. Rep. No. 23, 104th Cong., 1st Sess. 79 (1995); see also *id.* at 18. That language, which Congress did *not* adopt, would have strongly supported the Ninth Circuit's conclusion in this case.[9] Similarly, Congress could have written Section 153(46) to define "telecommunications service" as "the offering *as a separate service* of telecommunications for a fee directly to the public." That would likely have mandated the FCC's construction of the statute. Congress, however, took neither path, and it thereby left the ambiguity up to the FCC to resolve.

c. More generally, a statute that applies to entities that offer a service that can be supplied and used separately does not necessarily apply to entities that offer

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[9] In support of the contention that the FCC erred, Judge Thomas's concurring opinion relies (Pet. App. 36a-37a) on a Senate report discussing the version of the bill that contained the language quoted in the text. Congress, however, did not include that language in the 1996 Act's final definition of "telecommunications service." See *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974) (deletion of language in congressional bill "strongly militates against a judgment that Congress intended a result that it expressly declined to enact"). Judge Thomas also relied (Pet. App. 36a) on the House committee report, but that report does not contain any discussion of the classification of an integrated Internet access service. See H.R. Rep. No. 204, 104th Cong., 1st Sess., Pt. 1 (1995). In any event, that report, like the Senate report, addressed proposed language that ultimately was not adopted by Congress.

the service only as a component of some other, larger service. Consider, for example, a regulatory statute applicable only to airline service between New York and Chicago, and an airline that offers flights between New York and Los Angeles with a stop in Chicago strictly for refueling and with no opportunity for passengers to exit the plane. The question whether the New York-to-Chicago statutory provision applied to the offering of such coast-to-coast flights would likely turn on the purposes and policies underlying the statute, which might include concerns for limiting passenger traffic in the Chicago airport, easing passenger connections to other flights in Chicago, allocating landing rights in Chicago, or other matters. An agency entrusted with administering such a statute would have the discretion to consider the various policies involved and construe the statute in the manner best calculated to achieve them.

Just as the regulation in the above example is ambiguous in its application to the coast-to-coast air service, the application of the statutory definition of "telecommunications service" to cable modem service contains a similar ambiguity. The transmission of information included in cable modem service occurs *only* in connection with the further processing of the information involved, just as the flight from New York to Chicago occurs *only* in connection with the airlines' offering of New York-to-Los Angeles service. As the Commission recognized, the question whether there is an offering of telecommunications service, just like the question whether there is an offering of air service between New York and Chicago in the example, has no "easy or obvious answer[]." Pet. App. 87a. The Act simply does not "clearly indicate how cable modem service should be classified or regulated." *Ibid.*

This Court recognized in *Gulf Power*, when addressing the very issue of the proper classification of cable modem service under the Communications Act, that Congress left some flexibility in the statutory definitions for the FCC to resolve. As the Court noted, Congress was aware that cable modem service "might be expected to evolve in directions that Congress knew it could not anticipate." *Gulf Power*, 534 U.S. at 339. Congress also knew that "the subject matter here is technical, complex, and dynamic; and as a general rule, agencies have authority to fill gaps where the statutes are silent." *Ibid.* Accordingly, Congress left it to the FCC to resolve the statutory ambiguity regarding the proper classification of cable modem service, in accordance with the Commission's general authority to foster the policies underlying the Act. The Commission's exercise of its delegated authority to resolve that ambiguity should be upheld.

B. The FCC's Conclusion Is Supported By The Policies Of The Communications Act

1. The FCC's conclusion that cable modem service is an information service, not a telecommunications service, is a valid application of the policies of the Communications Act that the Commission is entrusted with interpreting and applying. Congress recognized in the 1996 Act that the Internet was then "flourish[ing]" under "a minimum of government regulation," 47 U.S.C. 230(a)(4), and declared that the Internet should, to the extent possible, remain "unfettered by Federal and State regulation," 47 U.S.C. 230(b)(2). Consistent with that guidance, the Commission has determined that establishing a "minimal regulatory environment" for broadband services will most effectively further the statutorily grounded policy of "encourag[ing] ubiqui-

tous availability of broadband to all Americans." Pet. App. 46a-47a (quoting 1996 Act § 706, 110 Stat. 153). Since the enactment of the 1996 Act, the Commission has therefore continued to take a "hands off" policy toward cable modem service, *Cable Modem NOI*, 15 F.C.C.R. at 19,288 ¶ 4, and the service has thrived during that period. Cable operators have invested billions of dollars in system upgrades that enable them to provide broadband Internet access service to their subscribers.[10] Cable modem service is today the most popular service by which residential consumers obtain high-speed access to the Internet, with 18.6 million cable modem lines in use as of June 2004. Industry Analysis & Technology Div., FCC, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at 2, Table 1 (Dec. 2004).

Regulating cable modem service as a telecommunications service would dramatically alter the regulatory environment that has fostered this investment and growth. Cable operators would have to restructure their pricing of cable modem service to reflect the fact that the telecommunications component of the service must be separated from its other components and be subject to the full panoply of Title II requirements. Cable operators also would have new financial obligations. They would be required to contribute to federal universal service support mechanisms,[11] 47 U.S.C. 254(d), as

[10] See *In re Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 17 F.C.C.R. 2844, 2871-2872 ¶ 65 (2002).

[11] Telecommunications carriers are required to pay into the universal service program an amount equal to a percentage of their interstate telecommunications revenue. That percentage—known as the "contribution factor"—is adjusted each quarter based on the projected demand for universal service support and the projected revenues that carriers expect to collect from their customers. For the first quarter of 2005, the Commission established a contribution factor of 10.7%. See FCC, *Proposed First Quarter 2005 Universal Service Contribution Factor*, Pub. Notice, DA 04-3902 (rel. Dec. 13, 2004).

well as to other funds that support telephone number portability and telephone relay services for the hearing impaired, see 47 C.F.R. 52.17, 64.604(c)(5)(iii), and they might have to pay higher pole attachment rates for constructing their networks, 47 U.S.C. 224.[12] Cable operators could also be obligated to engineer and operate their cable systems to accommodate interconnection between their cable systems and the networks of telecommunications carriers, 47 U.S.C. 251(a), or provide "open" access to cable facilities. See Pet. App. 62a-63a, 84a-85a (discussing technical hurdles associated with a multiple-ISP access environment). Those heightened regulatory obligations could lead cable operators to raise their prices and postpone or forego plans to deploy new broadband infrastructure, particularly in rural or other underserved areas. See *id.* at 103a n.176; see also 04-277 Pet. 19. Imposition of those obligations on cable operators could also discourage investment in facilities by competing Internet access providers. The Commission's decision advances the policies of the Act by avoiding the untoward consequences of respondents' approach.

[12] Owners of utility poles have a right to compensation for pole attachments. In the wake of the court of appeals' decision, they may claim to have the right to charge the generally higher "telecommunications rate" rather than the "cable rate" that applies for attachments carrying "mixed" cable/Internet traffic. See *Gulf Power*, 534 U.S. at 335-339.

2. In his concurring opinion below, Judge Thomas stated his view that applying Title II obligations to cable modem service providers would promote the goals of the Communications Act by "enhanc[ing] independent ISP access to telecommunications facilities." Pet. App. 34a. As this Court held in *Chevron*, however, "[s]uch policy arguments are more properly addressed to legislators or administrators, not to judges" who "are not experts in the field." 467 U.S. at 864-865. The Commission is evaluating in a pending proceeding what federal regulatory obligations, if any, it should impose on cable modem service providers under its regulatory authority. Pet. App. 133a-168a. It is in that forum that the policy debate over issues such as independent ISP access to cable facilities should take place.

C. Respondents' Other Arguments Should Be Rejected

1. Respondents err in suggesting (Brand X Opp. 27; see Earthlink Opp. 29; States Opp. 26) that the Commission's regulatory approach allows cable operators to "escape" common carrier obligations. Those obligations are generally applicable only to providers of telecommunications services. See 47 U.S.C. 153(44) ("A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."). If the Commission permissibly concluded that cable operators do not "offer * * * telecommunications for a fee directly to the public" under 47 U.S.C. 153(46), then there is no question of "escaping" a carrier obligation; cable operators providing cable modem service were not subject to the Act's common carrier obligations in the first place. To be sure, the Commission may require entities not otherwise subject to common carrier obligations to offer common carrier service if "the public

interest requires common carrier operation," such as where an entity has market power. *Virgin Island Tel. Corp.*, 198 F.3d at 925 (citing *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21,585, 21,589 ¶ 9 (1998)). The Commission, however, has not determined that the public interest requires cable modem service providers to make an "offering of telecommunications" indiscriminately to the public. See Pet. App. 97a.[13]

2. Respondents and Judge Thomas have also erroneously asserted (Brand X Opp. 19-22; States Opp. 23-25; Pet. App. 35a- 36a) that the FCC's decision in this case is inconsistent with the Commission's "*Computer II*" regime for regulation of telephone companies engaged in selling data processing services. Beginning in 1966, the Commission initiated a series of proceedings to address "regulatory problems raised by the confluence of communications and data processing." *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C. 2d 384, 386 ¶ 2 (1980) (*Computer II Order*), aff'd *sub nom.*

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[13] Relatedly, respondents err in contending that the FCC's classification of cable modem service in some way circumvents the criteria for forbearing from regulating telecommunications services under Section 10 of the Communications Act, 47 U.S.C. 160. See States Opp. 18, 27; Brand X Opp. 30; Earthlink Opp. 29-30. Section 10(a) provides that the Commission "shall forbear" from applying "any provision" of the Communications Act to a telecommunications carrier or a telecommunications service in certain specified circumstances. Section 10 does not speak to the threshold question whether cable modem service should be subject to regulation as a telecommunications service in the first place, such that forbearance would be necessary. Indeed, it would be particularly strange if the existence of Section 10—which Congress enacted to enable the relaxation of Title II's regulatory obligations—were used as a basis for interpreting the Communications Act to compel imposition of Title II obligations on cable modem service.

Computer and Communications Indus. v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). One issue was whether communications common carriers—particularly historical monopoly telephone companies whose networks were at that time essential to the efficient delivery of new computer services—"should be permitted to market data processing services, and if so, what safeguards should be imposed" to protect against anticompetitive or discriminatory practices. *Id.* at 389-390 ¶ 15.

a. In the *Computer II Order*, the FCC distinguished the telephone companies' "basic" services (which are "common carrier offering[s]" of "pure transmission capability," 77 F.C.C. 2d at 419-420 ¶¶ 93, 96) from their "enhanced services" (which are computer processing services "offered over common carrier transmission facilities," *id.* at 498, App. § 64.702(a), and are therefore similar to "information services" under the 1996 Act). Under the *Computer II Order* regime, the AT&T telephone monopoly and its successors could provide enhanced services only through separate affiliates that obtained their transmission capacity through tariffs made available to other enhanced service providers.[14]

[14] In the so-called *Computer III* proceeding, the Commission adopted non-structural safeguards as an alternative to the separate-affiliate requirement in the *Computer II Order*. See, *e.g.*, *Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C. 2d 958 (1986), vacated in part *sub nom. California* v. *FCC*, 905 F.2d 1217 (9th Cir. 1990) (agency history omitted). Currently, the Bell operating companies and their affiliates are the only common carriers required to provide enhanced services under either the separate-affiliate structure of *Computer II* or the non-structural safeguards adopted in *Computer III*. See generally *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*

Id. at 474 ¶ 229. Other facilities-based common carriers could integrate their common-carrier and enhanced-service offerings, but they also had to offer their self-furnished transmission capacity wholesale to other enhanced service providers on nondiscriminatory terms and conditions.[15] *Id.* at 475 ¶ 231. Under that framework, the Commission limited Title II regulatory obligations to traditional telephone companies' common carrier offerings, while enabling enhanced services to remain free from Title II regulation. See *id.* at 428-435 ¶¶ 114-132.

In the instant order, the Commission concluded that the regulatory framework adopted in the *Computer Inquiries* did not control its classification of Internet access services provided by cable operators. See Pet. App. 100a. The requirements of *Computer II* were imposed on entities that were already providing telephone service as "traditional wireline common carriers," largely on a monopoly basis under the old AT&T regime. *Ibid.* They have been "applied exclusively to traditional wireline services and facilities." *Ibid.* As the Commission had noted in its *Universal Service Report*, such "legacy regulatory frameworks" may not be appropriate for services and technologies related to the Internet, where the structure of the industry and the opportunities for various forms of inter-modal and intra-modal competition are quite different. 13 F.C.C.R. at 11,540 ¶ 82. In particular, unlike the traditional tele-

(*Wireline Broadband NPRM*), 17 F.C.C.R. 3019, 3038-3040 ¶¶ 39-42 (2002).

[15] At the time of the *Computer II Order*, many facilities-based common carriers not affiliated with AT&T were small telephone monopolies that served predominantly rural areas. See *Computer II Order*, 77 F.C.C. 2d at 467-471 ¶¶ 215-224 & Table 1.

phone companies for whom the *Computer II* regime was structured, cable operators providing cable modem service have never been viewed as common carriers, and neither that service nor traditional cable service has ever been viewed as "pure" transmission service that is comparable to the service offered by traditional telephone companies. Accordingly, the Commission acted reasonably in declining "to find a telecommunications service inside every information service, extract it, and make it a stand-alone offering to be regulated under Title II of the Act." Pet. App. 101a.[16]

b. Judge Thomas and respondents also appear to contend that Congress codified the requirements of

[16] Rather than expanding the reach of its decades-old *Computer II* regime by applying it to cable operators providing cable modem service, the Commission has instead initiated a proceeding to re-evaluate application of the *Computer Inquiries* regime to broadband services provided by traditional telephone common carriers in light of the "very different legal, technological and market circumstances" associated with broadband technologies and the federal policies of promoting broadband deployment and minimizing regulation of the Internet. *Wireline Broadband NPRM*, 17 F.C.C.R. at 3037 ¶ 35, 3040-3043 ¶¶ 43-53. If there were any tension between the *Computer II* regime and the Commission's decision in the proceeding below, that tension could be analyzed and resolved in the course of the *Wireline Broadband NPRM* proceeding.

Also in keeping with its overall policy goal of "develop[ing] an analytical approach that is * * * consistent across multiple platforms," the Commission is considering whether it should compel cable operators to offer the transmission capabilities they use in connection with their cable modem service to unaffiliated ISPs. See Pet. App. 135a. Especially in conjunction with the *Wireline Broadband NPRM* proceeding, that approach, too, promises to promote consistency in regulation in this area without tying the FCC to legacy regulatory structures developed in another era to address different concerns.

Computer II in the 1996 Act and thereby compelled cable modem service providers to offer a stand-alone transmission service to ISPs. See Pet. App. 35a-36a; States Opp. 23-25. When Congress sought in the 1996 Act to compel access to particular providers' network facilities and services, however, it made those requirements express. See, *e.g.*, 47 U.S.C. 251(b)(1) (obligation to resell telecommunications services), 251(c)(3) (duty to provide unbundled access to network elements), 251(g) (preservation of pre-existing access obligations on local exchange carriers), 259 (infrastructure sharing); see generally *Iowa Utils. Bd.*, 525 U.S. at 371-373 (discussing 1996 Act's network access requirements on local telephone companies). The 1996 Act imposes no similar obligation on information service providers that use their own telecommunications facilities to offer a tariffed transmission service under the framework established in the *Computer Inquiries*, nor does it extend the *Computer II* framework to cable operators providing Internet access service.

In support of their contrary view of the 1996 Act, Judge Thomas and respondents rely heavily on the Commission's statement in the *Universal Service Report* that the Act's definitions of "telecommunications service" and "information service" "build upon frameworks established" in the *Computer II* proceeding. See Pet. App. 36a (Thomas, J., concurring) (citing *Universal Service Report*, 13 F.C.C.R. at 11,511 ¶ 21); see also Brand X Opp. 14 n.45. As the Commission has explained, however, the 1996 Act's statutory term "information service" is broader than the Commission's regulatory term "enhanced service." Although the enhanced services at issue in the *Computer Inquiries* by definition were offered only "over common carrier transmission facilities," information services include

similar services provided "via telecommunications," *i.e.*, over either common-carrier facilities (which necessarily are employed in an offering of telecommunications to the public and therefore necessarily involve telecommunications service), or non-common-carrier (*i.e.*, "private," see note 2, *supra*) telecommunications facilities that have never been subject to *Computer II* requirements. *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21,905, 21,956 ¶¶ 102-103 (1996). The suggestion by Judge Thomas (Pet. App. 31a) and respondents (States Opp. 21 n.8) that the provision of an information service requires an underlying telecommunications *service* component (rather than just telecommunications) ignores that critical distinction.

II. THE NINTH CIRCUIT ERRED IN REFUSING TO REVIEW THE COMMISSION'S CLASSIFICATION OF CABLE MODEM SERVICE UNDER THE *CHEVRON* FRAMEWORK

The court of appeals refused to determine whether the Commission's decision constituted a permissible construction of the Communications Act under *Chevron*. Instead, the court concluded that the outcome here was determined by the *Portland* panel's contrary reading of the Communications Act, even though *Portland* did not "involv[e] potential deference to an administrative agency's statutory construction pursuant to the *Chevron* doctrine." *Portland*, 216 F.3d at 876.

The Ninth Circuit erred in refusing to apply the *Chevron* framework. This Court could opt to leave that error uncorrected, because the merits of the FCC's decision are now squarely before the Court and, whatever the prospective effect of the Ninth Circuit's *Portland* decision in that court, it plainly does not bind this Court in any way. But there is a significant conflict in the circuits concerning the interaction of the *Chevron* doctrine with the rule of *stare decisis*, see 04-281 Pet. 18-23, and the Court may wish to address that issue here. If so, the court should reject the Ninth Circuit's mistaken view that its own precedent predating the agency decision under review automatically precludes adherence to *Chevron*.

1. In *Chevron*, this Court set forth a fundamental principle that governs judicial review of an administrative agency's interpretation of a statute it administers: "If the statute is silent or ambiguous with respect to the specific issue [involved in a particular case], the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. *Chevron* does not contain any exception to that principle for cases in which courts have attempted to resolve the ambiguity without agency guidance, and any such exception would conflict with the rationale that underlies the *Chevron* doctrine. As the Court observed in *Smiley* v. *Citibank (S.D.), N.A.*, 517 U.S. 735, 740-741 (1996):

> We accord deference to agencies under *Chevron* * * * because of a presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency, understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows.

Where such an ambiguity exists, "a reviewing court has no business rejecting an agency's exercise of its generally conferred authority to resolve a particular statu-

tory ambiguity," so long as the agency has reasonably interpreted the statute. *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001).

In invoking *Portland* to invalidate the Commission's reasonable classification of cable modem service, the court of appeals undermined Congress's intent to delegate to the Commission the power to interpret gaps and ambiguities in the communications laws. *Iowa Utils Bd.*, 525 U.S. at 397. The Ninth Circuit rule also creates perverse disincentives for the kind of careful, deliberate agency decisionmaking the FCC engaged in here. If the FCC had resolved the cable modem issue precipitously in the 1998 *Universal Service Report*, the *Portland* court would have deferred to that judgment. Such incentives for rash agency judgments would be particularly costly in dealing with a new and fast-moving technology like the Internet.

As Judge O'Scannlain emphasized, the court of appeals' rationale for refusing to apply *Chevron* would "append[] a subversive codicil to *Chevron*'s rule"—that agency interpretations of ambiguous statutes are entitled to deference "unless the courts take it first." Pet. App. 24a (quoting Kenneth A. Bamberger, *Provisional Precedent: Protecting Flexibility in Administrative Policymaking*, 77 N.Y.U. L. Rev. 1272, 1273 (2002) (internal punctuation and cross-reference omitted)); cf. *Stinson* v. *United States*, 508 U.S. 36, 46 (1993) (agencies' interpretations of their own rules bind the courts even if they conflict with prior judicial constructions of the rules). The deference principle enunciated in *Chevron* should not be eviscerated in that manner.

2. The Ninth Circuit attempted (Pet. App. 20a-21a) to justify its rule by citing *Neal* v. *United States*, 516 U.S. 284 (1996). Regardless of the precise extent of the principle set forth in *Neal*, however, that case provides

no justification for the rule applied by the court of appeals below.

a. In *Neal*, this Court stated that the United States Sentencing Commission would not be entitled to deference for its interpretation of 21 U.S.C. 841(b)(1), because this Court had itself already reached a conclusion about what that statute "requires" in *Chapman* v. *United States*, 500 U.S. 453 (1991). See 516 U.S. at 295. The court stated that "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." *Ibid.*

The best reading of *Neal* is that the Court was merely stating the rule applicable when a court has already concluded that Congress itself has "directly spoken to the precise question at issue" and has left no room for the agency's construction (*i.e.*, when the prior decision makes clear that it is a *Chevron* "step-one" case). *Chevron*, 467 U.S. at 842. In *Neal* itself, the Court referred to its prior ruling in *Chapman* as a determination of what the statute at issue "requires." 516 U.S. at 293. And in *Chapman*, the Court had found the alternative reading of the statute "not plausible," 500 U.S. at 459, and had declined to apply the rule of lenity because the statute was not ambiguous, *id.* at 463-464. Thus, the best reading of the Court's statement in *Neal* is that it was limited to cases in which the statute at issue has already been judicially declared to have only one permissible interpretation.

That reading is confirmed by the two cases cited by the *Neal* Court in support of its refusal to defer, see 516 U.S. at 295; in both cases the Court's prior precedent had already stated the clear and unambiguous meaning of a statute, thus justifying the invocation of stare de-

cisis to overturn an intervening agency decision. See *Lechmere, Inc.* v. *NLRB*, 502 U.S. 527, 537 (1992) (noting that, when the Court in *NLRB* v. *Babcock & Wilcox Co.*, 351 U.S. 105 (1956), reversed the NLRB's interpretation of the National Labor Relations Act, it was "saying, in *Chevron* terms, that [the statute] speaks to the issue"); *Maislin Indus., U.S., Inc.* v. *Primary Steel, Inc.*, 497 U.S. 116, 130, 135 (1990) (holding that, by permitting conduct that "[f]or a century" the Court had held to violate the filed-rate doctrine, "the ICC has permitted the very price discrimination that the Act *by its terms* seeks to prevent") (emphasis added). There is nothing in *Neal* to suggest that the Court intended to develop a rule that would be more expansive than the one applied in those prior cases, nor would there be any basis for such a rule in light of the important considerations of policy and respect for the coordinate Branches that undergird the Court's decision in *Chevron*.

b. In any event, whatever stare decisis principle governs this Court's prior statutory constructions in light of this Court's unique role as the final arbiter of the meaning of federal statutes on a nationwide basis, there would be no justification for the court of appeals' elevation of its own precedent over the principles enunciated by this Court in *Chevron*. The principle that third parties should be able to rely on the legal norms announced in a judicial decision, see *Payne* v. *Tennessee*, 501 U.S. 808, 828 (1991), has far less force in the context of a circuit court decision, which might be subject to disagreement among the circuits and correction by a subsequent decision of this Court.

Adoption of a no-deference rule in the court of appeals would, moreover, have harmful consequences that would not follow if such a rule applied solely to this Court's prior decisions. As the Eleventh Circuit recog-

nized, a no-deference rule like the one adopted in the Ninth Circuit "illogically would wed [a circuit] to [its precedent] while all other circuits and the Supreme Court would be bound under *Chevron* to defer" to an agency's reasonable construction. *Satellite Broad. & Communications Ass'n of Am.* v. *Oman*, 17 F.3d 344, 348, cert. denied, 513 U.S. 823 (1994). Unlike the Ninth Circuit's rule, treating this Court's precedent as conclusive despite statutory ambiguity would not have a similar effect of setting the circuits on divergent paths and permitting the nationwide effect of a statute, in a case like this one, to be determined by the happenstance of a judicial lottery. Nor would a no-deference rule in this Court similarly encourage parties to "jump the gun" on the agency and obtain an early judicial ruling that would "freeze" the legal rule before the agency had the opportunity to act; no party could assure itself of early review in this Court, which frequently depends in any event on the development of a conflict in the circuits. And according a different *stare decisis* effect to this Court's precedents would also minimize the incentive for parties challenging an agency decision to forum-shop to obtain review of the decision in a circuit that had already taken a favorable position on the statutory question at issue before the agency reached its conclusion. See generally, *e.g.*, 28 U.S.C. 2343 (allowing a petitioner to challenge FCC rulemaking decisions either in the D.C. Circuit or in "the judicial circuit in which the petitioner resides or has its principal office").

3. No prior decision of this Court decided the classification of cable modem service under the Communications Act. Accordingly, this Court is not here presented with the question whether its own determination of the preferred interpretation of an ambiguous

statute would preclude an agency from reaching a different conclusion about the meaning of the same statute. But the Court should reject the Ninth Circuit's rule that a construction of an ambiguous statute by a court of appeals precludes according *Chevron* deference to a later construction of the same statute by the agency. Before the agency has acted, the legal question before the court of appeals is simply how best to resolve the statutory ambiguity. After the agency has interpreted the statute, however, the legal question before the court of appeals is whether the agency, to which Congress has delegated the authority to construe the statute, has adopted a permissible view. This Court is familiar with legal rules that accord no binding effect to prior decisions on an issue, when the issue comes before the same court later under a different legal standard. See, *e.g.*, *United States* v. *Watts*, 519 U.S. 148, 156 (1997) (per curiam) ("[A]n acquittal in a criminal case does not preclude the Government from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof."); *Dowling* v. *United States*, 493 U.S. 342, 349 (1990) (same). The same principle should govern in this context, especially where the effect of adopting the opposite rule would be to nullify Congress's delegation of primary authority to the agency—not the courts—to resolve the statutory ambiguity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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Nos. 04-277 & 04-281

In the Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS,

v.

BRAND X INTERNET SERVICES, ET AL., RESPONDENTS.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS,

v.

BRAND X INTERNET SERVICES, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS EARTHLINK, INC., BRAND X INTERNET SERVICES, AND CENTER FOR DIGITAL DEMOCRACY

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QUESTION PRESENTED

Whether the "telecommunications" component of cable modem service constitutes a "telecommunications service" under the Communications Act.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, respondents submit the following corporate information:

I. Respondent EarthLink, Inc. is a publicly traded company engaged primarily in the business of providing Internet access and related value-added services to business and residential customers nationwide. EarthLink, Inc. has no parent company and no wholly owned subsidiaries.

Sprint Corporation is a publicly traded corporation that has an ownership share in EarthLink, Inc. equal to or in excess of 10 percent. There are no other publicly traded companies that have ownership shares in EarthLink, Inc. of 10 percent or greater.

II. Respondent Brand X Internet Services is a privately held company, incorporated in California. It has no parent or subsidiaries.

III. Respondent Center for Digital Democracy is a not-for-profit corporation incorporated in the District of Columbia.

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In the Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL., PETITIONERS,

v.

BRAND X INTERNET SERVICES, ET AL., RESPONDENTS.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS,

v.

BRAND X INTERNET SERVICES, ET AL., RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS EARTHLINK, INC., BRAND X INTERNET SERVICES, AND CENTER FOR DIGITAL DEMOCRACY

STATEMENT

This case presents perhaps the single most important question under the telecommunications laws: who is a common carrier? That question has vital consequences because common carriers are presumptively required, absent forbearance by the Federal Communications Commission (FCC) under terms specified by Congress, to sell telecommunications services on a nondiscriminatory basis.

The Commission in the *Declaratory Ruling* under review specifically addressed the regulatory classification of "cable modem service"—a marketing bundle provided by cable companies that combines a high-speed telecommunications link with various information processing services such as e-mail. The Commission recognized that, if cable companies sold the telecommunications standing alone, they would be

offering a "telecommunications service" subject to regulation as common carriage. Nevertheless, it concluded that, merely by marketing that telecommunications bundled with additional services, the cable companies removed themselves from Congress's common carriage regulatory scheme. The FCC's reasoning is not limited to the classification of cable modem service, but instead applies equally to all bundled offerings that combine telecommunications with an information processing capability. The Ninth Circuit rejected the Commission's conclusion, having found in a prior case that a contrary conclusion was required by the plain statutory text, vacated the Commission's *Declaratory Ruling* in relevant part, and remanded for further Commission action not inconsistent with the court's ruling.

1. The Telecommunications Act of 1996 updates the common carrier regime codified by Congress in the Communications Act of 1934 (the Act). The central defined term of the amended Act is "telecommunications service," which is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46). In turn, "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43).

The statute presumptively subjects each "telecommunications service" to regulation as common carriage. Every "telecommunications carrier"—defined to mean "any provider of telecommunications services"—is "treated as a common carrier * * * to the extent that it is engaged in providing telecommunications services." 47 U.S.C. 153(44). Almost all of the Act's central regulatory requirements follow from the designation of a service as a "telecommunications service," and hence common carriage. Principally, a common carrier is required "to furnish such communication service upon reasonable request therefor," *id.* § 201(a), and not to discriminate in

its sales of telecommunications services, see *id.* § 202. Telecommunications carriers are also required to interconnect their facilities, see *id.* § 251, and to contribute to the federal "universal service" fund that is used to ensure affordable telecommunications services throughout the nation, see *id.* § 254.

In the 1996 Act, at the same time that it reaffirmed common carriage as the core concept of the telecommunications regulatory scheme, Congress granted the Commission the power to "forbear from applying" various common carrier obligations to providers of telecommunications services. Section 706 of the 1996 Act directs "[t]he Commission and each State commission with regulatory jurisdiction over telecommunications services [to] encourage the deployment on a reasonable and timely basis of advanced telecommunications capability" by utilizing various measures including "regulatory forbearance." 47 U.S.C. 157 note. Before the Commission may exercise its authority, it must find that enforcement of the statutory provision or regulation at issue is not necessary to prevent unjust or discriminatory practices or to protect consumers, and that forbearance will be in the public interest. See *id.* § 160(a).

2. As the Commission has repeatedly acknowledged, Congress enacted the definitional provisions of the 1996 Act to carry forward the framework of the Commission's *Computer Inquiries*[1] and the Modification of Final Judgment governing the breakup of AT&T (AT&T MFJ).[2] See, *e.g.*, *Federal–State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11,501, 11,511, ¶ 21 (1998). The Commission in the *Computer Inquiries* and the D.C. Circuit in implementing the AT&T MFJ repeatedly confronted bundled commercial offerings in which a telecommunications carrier

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[1] See Pet. App. 89a n.139 (detailing the history of these Commission proceedings). "Pet. App." refers to the corrected appendix to the petition for a writ of certiorari in No. 04-281.

[2] *United States* v. *AT&T*, 552 F. Supp. 131 (DDC 1982).

marketed a telecommunications link together with information processing functions. Carriers argued that, because the telecommunications link would be used to access the information processing function, the telecommunications component was no longer regulated. Both the Commission and the D.C. Circuit flatly rejected that argument, holding that the communications component of the bundled offering remained presumptively regulated as common carriage. Any other result, they explained, would permit carriers to circumvent common carriage regulation merely by packaging their telecommunications with some information processing capability. See, *e.g.*, *United States* v. *Western Elec. Co., Inc.*, 907 F.2d 160, 163 (CADC 1990); *Independent Data Mfr's Ass'n, Inc.*, Mem. Op. & Order, 10 F.C.C.R. 13,717, 13,723, ¶ 44 (1995).

The Commission applied the framework of the *Computer Inquiries* and the AT&T MFJ, as incorporated by Congress into the Act in 1996, in determining the regulatory status of Digital Subscriber Line (DSL) service. DSL-based Internet access is a high-speed Internet access service essentially identical to cable modem service except that it is offered over telephone wires. The telephone companies bundled the telecommunications component with information processing features such as e-mail and, on that basis, claimed that the telecommunications was not a "telecommunications service." The Commission rejected that argument, however, holding that the communications component remained regulated as common carriage. See, *e.g.*, *Deployment of Wireline Services Offering Advanced Telecommunications Capacity*, 13 F.C.C.R. 24,012, 24,030, ¶ 36 (1998).

3. The Commission in its *Declaratory Ruling* in this case confronted the regulatory classification of "cable modem service." That term refers to a bundled offering by cable companies of (i) high-speed telecommunications, and (ii) various information processing functions such as e-mail and personal web pages. Subscribers purchase the bundled offering principally for its telecommunications. The high-speed access provided by cable modem service is vastly preferable to the

much slower "dial-up" connection provided by traditional telephone service. But each subscriber generally has only one cable provider. Cable companies take advantage of the desirability of their exclusive offering to require subscribers to purchase not just high-speed telecommunications but information processing features as well.

It is undisputed that the two components of cable modem service are sold together simply for marketing purposes, not because they must be combined as a technological matter. Although subscribers can use the communications component to access the cable company's information processing functions, they can just as easily avoid the latter altogether and instead use e-mail services and web pages provided by third-party Internet service providers (ISPs) such as respondents Brand X and EarthLink, although the bundle sold by the cable companies forces subscribers to pay twice for the same information processing service in order to do so.

a. From the Telecommunications Act's adoption in 1996 until 2002, the Commission refused to classify cable modem service. In the *Declaratory Ruling* now under review, the Commission finally did so. The Commission rejected respondents' arguments, and held that "[c]able modem service is not itself and does not include an offering of telecommunications service to subscribers." Pet. App. 95a. Notably, it did not doubt that, if a cable company separately provided subscribers the telecommunications connection between their homes and the cable company's facilities, it would be providing a "telecommunications service." *Id.* 96a-97a. Contrary to its prior holding that Congress adopted the structure of the *Computer Inquiries* and the AT&T MFJ, however, the Commission declined to apply that structure to cable modem service. *Id.* 102a. The Commission found it decisive that cable companies do not offer subscribers the telecommunications component of cable modem service on a stand-alone basis, but rather market them together. See *id.* 97a, 101a.

The Commission also concluded that the commercial bundle of services was solely an "information service," with the asserted consequence that the entire bundle—including the telecommunications component—is not subject to the title II common carrier regime. The Communications Act defines an "information service" in relevant part as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). Despite the fact that the definition describes a capability that is delivered "via telecommunications," the Commission asserted that an information service may not include a telecommunications service because the two classifications are "mutually exclusive." Pet. App. 97a.

The Commission also relied heavily on its view that, as a policy matter, broadband Internet services such as cable modem service and DSL should be deregulated to the extent possible. Pet. App. 46a-48a. It did not, however, address the contention that Congress directed that such concerns be addressed through the statutory forbearance criteria in 47 U.S.C. 160.

The Commission recognized that the Ninth Circuit had previously reached the opposite result in *AT&T Corp.* v. *City of Portland*, 216 F.3d 871 (2000), holding that the telecommunications link of cable modem service is a "telecommunications service" under the Communications Act. But the Commission deemed that ruling unpersuasive on the procedural basis that the court of appeals had not, in the Commission's view, received sufficient briefing or the benefit of a sufficient record. See Pet. App. 115a-116a.

b. Commissioner Copps issued a pointed dissent. He could not "conceive that Congress intended to remove from its statutory framework core communications services such as the one at issue in this proceeding," a result under which "its statutory handiwork [would be made] obsolete." Pet. App. 199a. "Today we take a gigantic leap down the road of re-

moving core communications services from the statutory frameworks established by Congress, substituting our own judgment for that of Congress and playing a game of regulatory musical chairs by moving technologies and services from one statutory definition to another. * * * * With so much at stake, I would have hoped for a little more modesty and measured pace on our part." *Id.* 202a-203a. "Years ago, when I worked on Capitol Hill," Commissioner Copps explained, "we used to worry about legislation on an appropriations bill. Down here, I'm learning that I have to look out for legislation on an NPRM." *Id.* 201a.

4. Petitions for review of the FCC's ruling were consolidated before the Ninth Circuit, which vacated in relevant part the Commission's *Declaratory Ruling* and remanded for further proceedings. The court of appeals held that the case was controlled by its prior precedent.

a. In its *City of Portland* decision, the Ninth Circuit distinguished for regulatory purposes the "two elements" of cable modem service: "a 'pipeline' (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline." 216 F.3d at 878. The court classified the telecommunications component in light of the plain text of the Act and the prior *Computer Inquiries* framework that Congress had adopted. To the extent the cable company merely provides information processing functions, the court of appeals concluded, "its activities are that of an information service." *Ibid.* But with respect to "its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *Ibid.* The court of appeals noted, however, that the classification of a service did *not* determine the extent to which it would ultimately be regulated, given the Commission's "broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest." *Id.* at 879.

b. In this case, the Ninth Circuit deemed *City of Portland* controlling as a matter of *stare decisis* because that decision had turned on the plain terms of the Act, as opposed to engaging in "deferential review of agency decisionmaking." Pet. App. 18a (quoting *Mesa Verde Constr. Co.* v. *Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (CA9 1988) (en banc) (alterations omitted)). It found that conclusion supported by the holding of *Neal* v. *United States*, 516 U.S. 284, 294-95 (1996), that "[o]nce we have determined a statute's meaning, we adhere to our ruling under the doctrine of *stare decisis*, and we assess an agency's later interpretation of the statute against that settled law." Pet. App. 20a.

Judge Thomas concurred to make clear that he would have reached the same result even if *City of Portland* were not binding. Pet. App. 25a. "Nothing in the definition [of telecommunications service] suggests that the telecommunications component must be priced or offered separately in order to qualify as a telecommunications service. Under the FCC's approach, the general public would be purchasing a service that nobody offered." *Id.* 31a. He found that conclusion reinforced by the statutory scheme as a whole:

> In order to foster this competition, the 1996 Act applies the traditional common carrier obligations of nondiscrimination and interconnectivity to telecommunications service providers "regardless of the facilities used." 47 U.S.C. § 153(46). Application of these principles to cable modem service would enhance independent ISP access to telecommunications facilities, almost certainly increasing consumer choice. Naturally, the FCC may choose to forbear from enforcing these regulations if it determines they are not necessary to promote competition or protect consumers. 47 U.S.C. § 160(a)–(b). Nonetheless, the Act creates a general presumption in favor of opening markets to competition.

Id. 34a-35a.

5. The Commission petitioned for rehearing en banc, arguing that the Ninth Circuit should overrule *City of Portland*. The Department of Justice declined to join the petition. Immediately after the petition for rehearing en banc was filed, the Department, joined by the Office of the Solicitor General, filed a letter with the Commission stating "that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA [the Communications Assistance for Law Enforcement Act, 47 U.S.C. 1001 *et seq.*]." EarthLink BIO App. 14a.[3] CALEA requires "telecommunications carriers" to design their networks so as to make them more readily accessible to law enforcement authorities conducting lawful electronic intercepts. See 47 U.S.C. 1002. However, the statute excludes from the definition of "telecommunications carrier" "persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i). Hence, if the Commission's conclusion in the *Declaratory Ruling* that cable modem service is exclusively an information service applies under the parallel terms of CALEA, cable modem facilities are exempt from that statute's law enforcement provisions.

6. No active judge called for a vote on the petition for rehearing en banc, and the petition was denied. Pet. App. 207a. The Commission then instituted a rulemaking on CALEA under which it proposes to deem cable modem service solely an "information service" under the Communications Act, but not an information service at all under CALEA. See *Communications Assistance for Law Enforcement Act and Broadband Access and Services*, 19 F.C.C.R. 15,676, 15,706, ¶ 50 (2004). The Department of Justice then filed a joint petition for certiorari in this Court, which was granted. See 125 S.Ct. 654, 655 (2004).

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[3] "EarthLink BIO App." refers to the appendix to EarthLink's opposition to certiorari in Nos. 04-277 and 04-281.

SUMMARY OF ARGUMENT

The question presented by this case is what test Congress intended to use in determining whether a telecommunications offering is common carriage. The question arises in the context of "bundled" offerings of two services marketed together—here, "cable modem service," which is a combination of high-speed telecommunications over cable wires and additional information processing services such as e-mail. The Commission does not dispute that when the telecommunications component is sold standing alone, it is a "telecommunications service" and hence common carriage. Respondents contend it makes no difference under the statute whether that telecommunications is marketed together with some other service. The Commission rejected that argument, deeming it decisive that the provider chooses to sell the two services together. As a result, providers such as cable companies are free to avoid common carriage regulation so long as they sell their telecommunications only as part of a marketing bundle.

The determination whether an offering is common carriage has vital consequences; there may be no more important question under the telecommunications laws. Most important, common carriers presumptively must make telecommunications services available at nondiscriminatory rates to any willing buyer. Thus, in this case, if the telecommunications component of cable modem service is a "telecommunications service," and hence common carriage, the cable companies cannot discriminate against independent Internet service providers (ISPs) such as respondents EarthLink and Brand X. Customers then will be able to choose their provider of Internet services—whether the cable company or third parties—on the merits of their information service offerings. By contrast, under the regime adopted by the Commission in this case, the cable companies can circumvent that obligation, thereby limiting competition and forcing their customers to purchase both telecommunications and other services such as e-mail from them as a package, merely by marketing the two together.

The Commission's position cannot be reconciled with the statutory text, the administrative and judicial framework on which the statute was based, or the policies that Congress was pursuing. The Commission has made no serious argument that the telecommunications component of a bundled offering does not qualify as a "telecommunications service," which the statute defines as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available to the public, regardless of the facilities used." 47 U.S.C. 153(46). The Commission does not dispute that the telecommunications component of cable modem service is a telecommunications service if sold standing alone. Nothing in the definition of telecommunications service suggests that a different result follows if the telecommunications is marketed together with some other service.

Congress could not have intended the question of regulatory classification to turn on the provider's self-interested marketing decision. If anything, when a provider combines common carriage with some other service, the nondiscrimination rationale underlying common carriage regulation is *enhanced*. The combination makes it all the more likely that the provider will use its control over the telecommunications component to discriminate against competitors in the market for the further service. This case is a perfect illustration, as customers who seek to purchase independent Internet access services must effectively pay for that class of services twice: once as part of the cable modem service bundle, and a second time from independent providers such as respondent ISPs.

The Commission's contrary position rests on its assertion that cable modem service satisfies the statutory definition of an "information service" as an "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. 153(20). That is entirely beside the point. Respondents do not contend that cable modem service—*i.e.*, the bundled information service package—should

be regulated as common carriage. Rather, respondents contend that the *telecommunications component* of cable modem service is a telecommunications service.

So, in order to successfully defend its *Declaratory Ruling*, the Commission must prevail on its argument that an information service cannot contain a regulable telecommunications service—in its words, that the categories are "mutually exclusive." That argument, which is the nub of its position, is completely meritless. There is nothing in the text of the statute, the policies underlying it, or the legislative history that suggests Congress intended the category of "information services" to be exclusive of any other regulatory classification.

Any doubt about the classification of the telecommunications component of cable modem service is resolved by the framework that Congress adopted in enacting the definitions at issue. The Commission has repeatedly recognized—but now inexplicably attempts to disavow—that Congress adopted the terms "telecommunications service" and "information service" to parallel similar terms in the Commission's own *Computer Inquiries* and the AT&T MFJ. It is *decisive* that in those proceedings the Commission and the courts confronted precisely the question now at issue here—whether common carriage telecommunications lost that character when combined by a provider with an information service—and both decided it the opposite way. The Commission and the courts recognized in those proceedings that the very rule the Commission now adopts would produce the absurd result, which Congress could not have intended, that a carrier can effectively deregulate itself through the nicety of combining its regulated offering with some other service.

The Commission attempts to save its position by invoking Congress's broad goal of deregulating telecommunications. That argument is misplaced, for the plain terms of the statutory definitions are controlling. Congress moreover created a specific "forbearance" regime to guide and constrain the Commission in determining when to lift common carriage

regulation. The Ninth Circuit's ruling in this case properly leaves it to the Commission on remand to apply the statutory criteria to decide whether to lift the common carrier requirements presumptively applicable to the telecommunications component of cable modem service.

Finally, the *Declaratory Ruling* is not entitled to *Chevron* deference and, even if it were, respondents would prevail. It is not plausible to conclude that Congress delegated to an agency the fundamental question—on which essential aspects of telecommunications regulation rest—of what test to use in deciding whether services offered to tens of millions of Americans are common carriage. See *MCI* v. *AT&T*, 512 U.S. 218, 229-30 (1994). The Commission's claim to deference is moreover severely undercut by the substantial inconsistencies in its position: both in the Commission's rejection of its prior recognition that Congress intended to adopt the framework of the *Computer Inquiries* and the AT&T MFJ, and in its conclusion under the parallel law enforcement provisions of CALEA that cable modem service is *not* an information service. Finally, although the Ninth Circuit's decision in *City of Portland* is of course not binding here—in contrast to the proceedings in the court of appeals—the Commission erred in ignoring the substance of that prior judicial construction of the statute.

ARGUMENT

This case presents perhaps the most fundamental question in federal telecommunications law: who is a common carrier? The Commission has adopted a reading of the statute under which carriers themselves may choose not to be regulated simply by adding an information processing component to a transmission service—a service that the Commission concedes would be a common carrier telecommunications service if it were offered alone. The Commission's approach would render much of the Communications Act a nullity and leave the Commission without the authority to regulate in any

meaningful way vast communications networks serving millions of people over public rights of way.

This case is specifically about cable modem service, but the Commission has clearly indicated its intention to follow the same course with respect to DSL service provided over telephone wires. See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3033, ¶ 25 (2002). Moreover, there is nothing in the Act or in the Commission's *Declaratory Ruling* that would limit the rule enunciated by the Commission to "broadband" offerings. Thus, for example, it would be possible for a telephone company that provides dial-up Internet access service (or any other information service) over its own facilities to combine that information service with basic telephone service and thereby to escape regulation of the underlying transmission service. The Commission's decision would thus allow all carriers to opt into or out of regulation purely on the basis of whether they chose to offer their services under a single bundled price, or instead under separate prices. That is not a reasonable reading of either the Act's individual provisions or the statute as a whole.

I. "CABLE MODEM SERVICE" IS MERELY A TERM DESCRIBING CABLE COMPANIES' SALE OF TWO DIFFERENT PRODUCTS BUNDLED TOGETHER: TELECOMMUNICATIONS AND INFORMATION PROCESSING.

This case presents the question of how to classify so-called "bundled offerings"—commercial combinations of two otherwise separate products—under the Communications Act of 1934 as amended by the Telecommunications Act of 1996. As we discuss *infra* Part II, the answer to that question is that the telecommunications component of the bundled offering retains its separate regulatory status. In this Part, we describe the bundle at issue in this case, "cable modem service."

Cable modem service is a form of "broadband" Internet access service. The other major broadband product is Digital Subscriber Line (DSL) service. Pet. App. 50a. The difference is that cable modem service is provided by cable companies over cable wires, while telephone companies provide DSL service over telephone wires.

Cable modem service has two components: a telecommunications link to the Internet, described by the Commission as "Internet connectivity," Pet. App. 61a, and various information processing features. As the Commission explains, the second component includes "access to unique content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web." FCC Br. 20 (quoting Pet. App. 52a-54a) (alterations omitted).

Cable companies market these two components as a single package under the label "cable modem service," and they refuse to sell the two components separately. The reason they do so is obvious. Most households in America have only one cable provider. See *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, Eleventh Annual Report*, 2005 WL 275740, ¶ 136 (2005). The high-speed Internet access that cable lines provide is highly desirable, see *infra* Part III.B.3, so cable companies require their subscribers who want high-speed transmission to purchase information processing features as well.

To be sure, the transmission and information functions of cable modem service are related. The Commission emphasizes their relatedness. It explains that the subscriber uses the high-speed telecommunications pipeline to access various information features. For example, subscribers can use the communications link to retrieve e-mail provided by the cable company or can access a personal web page provided by the cable company. See FCC Br. 20.

But the Commission's emphasis on the relatedness of the two components of cable modem service is incomplete and,

as a consequence, misleading. It omits that the telecommunications and information components are physically separate. Still more important, the fact that the two components can be used together omits that they can equally be used *apart*, as they have been for years on the telephone-wire-based DSL platform. The Commission itself has consistently "distinguished between the common carrier offering of basic transmission service, which provides a communications path for the movement of information, and the offering of enhanced services, which * * * [consist] primarily of data processing services." *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, 7419-20 (2001). The fact that AOL Time Warner provides transmission services to unaffiliated ISPs under merger conditions imposed by both the FCC and the Federal Trade Commission demonstrates that the two components are separate. See Pet. App. 110a–111a.

To take the Commission's own examples, FCC Br. 20, the subscriber is perfectly able to use the transmission component of cable modem service to access different content, a different e-mail service, different news groups, or a different service for providing a personal web page. It is thus critical that the Commission conceded repeatedly in the ruling under review that subscribers were not required to use the information services offered by the cable company, but could "click through" those services and use the telecommunications component of cable modem service for the sole purpose of reaching information services offered by other providers. See Pet. App. 57a, 78a, 146a.[4]

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[4] Even the term "click through" is misleading, because it suggests that the subscriber must actually use the cable company's information processing features. That is not the case.

The Commission correctly does not contend that the telecommunications and information processing components of cable modem service are inextricably intertwined on the basis that the cable company's computers manage the telecommunications network, such as by issuing Internet Protocol addresses to subscribers' computers. Every telecommunications system includes incidental information management components. The telephone network, for example, must assign and recognize phone numbers. The Act accordingly excludes those capabilities from the definition of "information service," which "does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. 153(20).

Just as the subscriber can use the transmission component of cable modem service to reach third-party services, that subscriber can also use the information features provided as part of the cable modem service bundle entirely separate and apart from the telecommunications link provided by the cable wires. Thus, subscribers who have a cable modem service account at their home can just as easily access the information processing features from other places. For example, they can retrieve that unique content, e-mail and personal web pages from a high-speed Internet connection at work, or they can use those features while traveling through a dial-up connection or a high-speed connection at an Internet cafe.

In sum, cable modem service is a marketing bundle of two distinct services.

II. UNDER THE PLAIN TEXT OF THE STATUTE, CABLE MODEM SERVICE INCLUDES A TELECOMMUNICATIONS SERVICE.

The Act defines a "telecommunications service" as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. 153(46). "Telecommunications" is "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The FCC concluded in its *Declaratory Ruling* that "[c]able modem service is not itself and does not include an offering of

telecommunications service to subscribers." Pet. App. 95a. The second of those conclusions—that cable modem service does not *include* a telecommunications service—is contrary to the plain text of the statute, as well as to prior precedent under which the telecommunications component of an information service retains its independent regulatory status. The Commission has repeatedly recognized that Congress codified that precedent when it adopted the relevant statutory definitions in 1996.

A. The Telecommunications Link Provided by Cable Modem Service Satisfies Each Element of the Definition of "Telecommunications Service."

1. The Commission concedes that the transmission component of cable modem service constitutes "telecommunications." "The Commission has previously recognized that 'all information services require the use of telecommunications to connect customers to computers or other processors that are capable of generating, storing, or manipulating information.'" Pet. App. 96a (footnote omitted) (alterations omitted). The transmission component of cable modem service carries information between the subscriber's computer and computers that support applications such as e-mail and web pages on the Internet. That transmission does not change the form or content of the information. Instead, changes to the information occur in the computers at the ends of the transmission lines.

Having established that the transmission involved in cable modem service is "telecommunications"—both because it meets the definition of that term and also because the definition of "information service" specifies that a service is only an information service if it is provided "via telecommunications," see 47 U.S.C. 153(20)—the only remaining issues regarding the definition of telecommunications service are whether the telecommunications is offered (i) "for a fee" (ii) "directly to the public." *Id.* § 153(46).

In the case of cable modem service, the offering obviously meets both prongs of the test. Cable modem service is offered as a mass-market service to the public. "As of December 2003, there were 16.4 million cable modem lines in use," FCC Pet. 25, and of course users must pay the subscription "fee" to the cable company. The Commission does not contend otherwise, and has never contested that the telecommunications component of cable modem service is offered "for a fee directly to the public." 47 U.S.C. 153(46). Moreover, the fact that the telecommunications so offered uses cable wires rather than telephone wires is entirely irrelevant, because "telecommunications service" is defined functionally, "regardless of the facilities used." *Ibid.* The Commission agrees. See Pet. App. 90a. That is the beginning and the end of the statutory analysis.

Verizon Communications, which argues vociferously in its brief before this Court that cable modem service is solely an information service, captured the statutory terms perfectly when it took precisely the opposite position before the Commission in the proceeding below:

> This question answers itself. * * * Although cable operators also afford customers access to proprietary content, representatives of the cable industry have testified that cable modem customers can completely "bypass" that content and "access AOL, other subscription services, or any website accessible over the public Internet with 'one click' of [a] computer mouse." Indeed, AT&T [Broadband Cable Services] has "committed" to the Commission that it will facilitate "maximum access by its customers to any content of their choosing," and that customers can reach any Internet destination without having to "go through" AT&T's affiliated ISP or "view any * * * content or screens" provided by that ISP. Cable operators are thus offering for a fee to the public a service that transmits "information of the user's choosing, without change in the form or content of the information as sent and received" "between or among points specified

> by the user" -- in other words, a telecommunications service. This conclusion is the only one that can be squared with the Act and the Commission's precedents.

Comments of Verizon Comms., FCC GN Docket No. 00-185, at 10-11 (Dec. 1, 2000) (footnotes omitted) (alterations in original).

2. The Commission notably has never disputed that a cable company would be offering a telecommunications service if it offered, on a stand-alone basis, that telecommunications link. See, *e.g.*, FCC Br. 24; Pet. App. 97a. If this Court is to sustain the Commission's *Declaratory Ruling*, therefore, it must do so on the ground that Congress intended that by "bundling" two distinct functions, the carrier could eliminate the separate regulatory status of each of the service's constituent parts and thereby exempt itself from common carrier regulation.

The FCC contends that cable modem service does not include a telecommunications service because it combines telecommunications with information processing features, rather than offering telecommunications on a "stand-alone" basis. "'As provided to the end user,' the 'telecommunications component' of cable modem service is not offered 'separately from the data-processing capabilities of the service,' but 'is part and parcel of' the service being offered." FCC Br. 23 (quoting Pet. App. 96a) (alterations omitted).

The simple answer is that the definition of "telecommunications service" does not refer to a "stand-alone offering." The Commission points to no language in the Act to support this additional requirement, nor could it. Neither the Commission, see *United States* v. *Calamaro*, 354 U.S. 351, 359 (1957), nor the courts, see *Sale* v. *Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 168 n.16 (1993), may "add terms or provisions where congress has omitted them," *ibid.* Moreover, when Congress intended for the classification of a service to turn on whether a separate fee was charged, it said so explicitly. See 47 U.S.C. 153(48) (defining "telephone toll service" as "telephone service * * * for which there is made a separate charge").[5]

The force of the plain text of the statute is substantially reinforced when the absurd result of adding limitations is that carriers can circumvent the regulatory consequences of classification as "telecommunications service" merely by marketing that service together with some information processing feature. Were that the case, common carriage regulation would fall apart, as each provider sold its telecommunications service bundled with an information service delivered over that telecommunications link.

B. Congress's Intent to Recognize the Presence of a Telecommunications Service in Bundled Products is Plain from Its Adoption of the Framework of the Commission's Prior *Computer Inquiries* and the Order Breaking Up AT&T.

Any doubt about the proper construction of the term "telecommunications service" is resolved by the framework upon which Congress based the regulatory categories of the 1996 Act. Prior to that Act's adoption, the Commission had repeatedly confronted the proper regulatory classification of bundled communications and information processing services in the *Computer Inquiries*, in which the Commission established the categories of "basic" and "enhanced" services. The courts had confronted closely analogous issues in the Modifi-

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[5] The cable industry petitioners echo the Commission's argument in the guise of the term "offering." They contend that cable modem service constitutes the "offering" of the bundled package, not the telecommunications. An "offering" is defined as "a thing offered." The New Oxford American Dictionary 1188 (2001). In turn, to offer is to make something "available for sale." *Ibid.* That plain meaning says nothing about a separate offering. It may well be that cable companies offer their subscribers "cable modem service." But it is equally true that subscribers are "offered" the high-speed telecommunications link that cable modem service provides.

cation of Final Judgment governing the break-up of AT&T (AT&T MFJ), which created the categories of "telecommunications" and "information services." *United States* v. *AT&T*, 552 F. Supp. 131 (DDC 1982).

1. The Commission has repeatedly acknowledged that Congress specifically adopted the *Computer Inquiries* and the AT&T MFJ as the basis for the statutory provisions at issue here:

> Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon frameworks established prior to the passage of the 1996 Act. Specifically, we find that Congress intended the categories of "telecommunications service" and "information service" *to parallel* the definitions of "basic service" and "enhanced service" developed in our Computer II proceeding, and the definitions of "telecommunications" and "information service" developed in the Modification of Final Judgment breaking up the Bell system.

Federal-State Joint Board on Universal Service, Report to Congress, 13 F.C.C.R. 11,501, 11,511, ¶ 21 (1998) (emphasis added) (*Universal Service Report to Congress*); see also Pet. App. 89a-90a n.139 (collecting authorities implementing the *Computer Inquiry* basic/enhanced framework and reaffirming that the definition of "information service" follows from these precedents). As the parties and *amici* supporting the Commission admit, the FCC has repeatedly acknowledged that "information service" is "a term that, for present purposes, is equivalent to the 'enhanced services' designation the FCC developed in the *Computer Inquiry* proceeding." Bellsouth Br. 6 (collecting authorities). See also Telecomm. Indus. Ass'n Br. 8 (the categories of the *Computer Inquiries* "were essentially re-named and codified by the 1996 amendments to the Act" (collecting authorities)); H.R. REP. No. 104-458, at 115-16 (1995), reprinted in 1996 U.S.C.C.A.N. 10, 126-27

(expressing Congress's intent to adopt the framework of the AT&T MFJ).[6]

In the *Computer Inquiries*, the Commission defined the terms "basic service" and "enhanced service" to distinguish the former as telecommunications from the latter as a *combination* of telecommunications and information processing. An enhanced service necessarily included a basic service:

> We find that basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service *combines* basic service with computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information.

Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), 77 F.C.C.2d 384, ¶ 5 (1980) (emphasis added) (*Computer II*).

2. Given that Congress intended the terms "telecommunications service" and "information service" in the 1996 Act to have the same meaning as the parallel terms in the *Computer Inquiries* and the AT&T MFJ, it is *decisive* that those prior proceedings confronted precisely the same question as in this case and held that the telecommunications components of bundled offerings were common carriage.

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[6] The Commission mischaracterizes respondents' position as claiming that Congress, by adopting the *Computer Inquiries* framework, "froze" the regulatory regime—*i.e.*, the Commission claims that respondents read the statute to require that telecommunications services ultimately must be subject to the statute's nondiscrimination requirements, as under the *Computer Inquiries*. See FCC Br. 17. In fact, respondents argue only that the relevant definitions set the starting point for regulatory decisions. Congress adopted the forbearance procedures of 47 U.S.C. 160 to provide the Commission with ample authority to adjust that default regime.

In and after the *Computer Inquiries*, the Commission repeatedly held that the telecommunications component of a bundled package offered by the owner of a telecommunications facility is separately regulated, such that the telecommunications component remains a "basic service" regulated as common carriage. As the FCC concluded in terms that precisely parallel the statutory inquiry here:

> Since the Computer II regime, we have consistently held that the addition of the specified types of enhancements (as defined in our rules) to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations, whether federal or state, with respect to that service.

Filing and Review of Open Network Architecture Plans, 4 F.C.C.R. 1, 141, ¶ 274 (1988) (footnotes omitted). As the FCC acknowledges, under the *Computer Inquiries*, although "facilities-based common carriers could integrate their common-carrier and enhanced-service offerings," the common-carrier component remained subject to regulation under Title II of the Communications Act, while the "enhanced services * * *-remain[ed] free from Title II regulation." Br. 35 (citations omitted). A contrary approach, the Commission said,

> would allow *circumvention* of the Computer II and Computer III basic-enhanced framework. AT&T would be able to avoid Computer II and Computer III unbundling and tariffing requirements for any basic service that it could combine with an enhanced service. *This is obviously an undesirable and unintended result.*

Independent Data Manufacturer's Association, Inc., Mem. Op. & Order, 10 F.C.C.R. 13,717, 13,723, ¶ 44 (1995) (emphasis added).

The same issue arose in the context of the AT&T MFJ. There, the Bell Operating Companies (BOCs) contended that a bundled product was an "information service" not a "telecommunications service" because:

> the [telecommunications] portion of the gateway service is not offered for hire and therefore the proposal is not covered by the decree. In other words, it is claimed that so long as the [telecommunications] portion of the service is not separately identified to the customers and not separately charged to the customer, it is not offered for hire even though it is bundled in the overall gateway service, which is clearly offered for hire.

United States v. *Western Elec. Co., Inc.*, 907 F.2d 160, 163 (CADC 1990). The D.C. Circuit, however, rejected that conclusion as a "strained interpretation of the language of the decree" that could not have been intended because it would allow the BOCs to "create an *enormous loophole* in the core restriction of the decree" through the nicety of bundling telecommunications with an information service. *Ibid.* (emphasis added).

3. The Commission's recognition that Congress adopted the *Computer Inquiries* and AT&T MFJ framework in the 1996 Act—and thereby dictated the conclusion that marketing bundles continue to contain a regulable telecommunications service—is apparent from the FCC's classification, prior to the proceedings now under review, of the DSL-based Internet access service provided by telephone companies. Although telephone companies provide DSL over their copper telephone wires, while cable companies provide their service over cable wires, the statute does not give any effect to that difference. See 47 U.S.C. 153(46) (defining telecommunications service functionally, "regardless of the facilities used").

Prior to the rulemaking in this case, the Commission evaluated the proper classification of DSL service under the Act. Rejecting precisely the argument that it now accepts—*i.e.*, that the use of telecommunications to access information processing functions changes the statutory classification of the telecommunications—the FCC held that the distinct functions of DSL-based Internet access service mean that tele-

phone companies are offering two distinct services for regulatory purposes:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services *separately*: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Deployment of Wireline Services Offering Advanced Telecommunications Capability, 13 F.C.C.R. 24,012, 24,030, ¶ 36 (1998) (emphasis added).

Congress's determination to adopt the *Computer Inquiries* and AT&T MFJ framework precludes the Commission's interpretation of the statute in the *Declaratory Ruling*.

C. Congress's Purpose in Designating "Telecommunications Service" as Common Carriage Supports the Plain Language of the Definition of Telecommunications Service.

1. In addition to the fact that the statutory definitions are clear, Congress's determination to mandate that providers of telecommunications services be subject to common carriage regulation absent regulatory forbearance by the Commission precludes a reading under which the regulatory status of those services changes merely because a carrier bundles a telecommunications service with an information processing application. That self-interested economic choice by the provider is not relevant to Congress's regulatory goals.

In the *Computer Inquiries*, the Commission explained that the purpose of its "basic" and "enhanced" categories was to maintain the nondiscrimination regime applicable to common carriage, so that providers of information processing services would be able to compete on a level playing field with carriers:

> [A]n essential thrust of this proceeding has been to provide a mechanism whereby non-discriminatory access can be had to basic transmission services by all enhanced service providers. Because enhanced services are dependent upon the common carrier offering of basic services, a basic service is the building block upon which advanced services are offered. Thus those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized. Other offerors of enhanced services would likewise be able to use such a carrier's facilities under the same terms and conditions.

Computer II, 77 F.C.C.2d 384, ¶ 231.

The most basic requirements of common carriage regulation are the related obligations "to furnish such communication service upon reasonable request therefor," 47 U.S.C. 201(a), and not "to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services," *id.* § 202(a). Non-discrimination is the fundamental principle of federal telecommunications law, embodied not merely in the 1996 Act, but also in the 1934 Act it amended and in the statutes that were the basis for the 1934 Act. As this Court has explained, the common carrier provisions of the Communications Act of 1934 are largely modeled after the Interstate Commerce Act (ICA), enacted in 1887, and "share its goal of preventing unreasonable and discriminatory charges." *AT&T* v. *Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). The principal purpose of the ICA was to address the "wrongs resulting from unjust discrimination

and undue preference." *Texas & Pac. Ry. Co.* v. *Abilene Cotton Oil Co.*, 204 U.S. 426, 439 (1907).[7]

The *Computer Inquiries* rested on the Commission's "concern[] * * * that carriers providing both basic telecommunications services and enhanced services could discriminate against competitive enhanced service providers that sought to purchase underlying transmission capacity from the carrier." *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, 7420, ¶ 3 (2001). Put differently, the discrimination concern at which the Act's common-carriage requirements are directed is *enhanced*, not diminished, when regulated services are combined with unregulated services.

Here, the fact that cable companies are requiring their customers to purchase telecommunications together with information services, if anything, makes common carriage regulation more necessary, not less. As noted, cable modem service is made up of two components: a telecommunications link and information processing features. Simple economics dictates that not every information service provider can build its own communications network; nor could the public be expected to pay for such duplication. Thus, if consumers are to receive the benefit of information services provided by any-

[7] The principle of common carriage and the requirement of nondiscrimination run through more than a century of congressional enactments. For example, in 1894, this Court held that telegraph companies, like "railroad companies and other common carriers," were "instruments of commerce" in the exercise of public employment, and were therefore "bound to serve all customers alike, without discrimination" under the ICA. *Primrose* v. *Western Union Tel. Co.*, 154 U.S. 1, 14 (1894). In 1910, the Mann-Elkins Act, 36 Stat. 539, 544-545 (1910), expanded the ICA's jurisdiction to include the rates and practices of telephone companies. The Transportation Act, 41 Stat. 456, 474 (1920), further expanded the federal government's jurisdiction to include "the transmission of intelligence by wire and wireless."

one other than the owners of transmission networks, those networks must be treated as common carrier networks. The respondents in this case include two independent Internet service providers (ISPs) that are in business to sell information services to residential and business customers. Unless ISPs are able to purchase transmission services that allow them to deliver their information processing services to their customers, those customers will not as a practical matter receive their services. Customers will not be willing to pay twice—once for the information processing features of the cable company, and again for those of the independent ISPs—and generally are unwilling to deal with two providers in order to obtain a package of services that they can obtain from one. If independent ISPs are to be able to market their services successfully, they must therefore be able to purchase the transmission link and create their own bundled offerings. The Commission's treatment of the cable modem service bundle—*i.e.*, excluding from regulation the transmission service that constitutes the essential "building block" of the offering—thus puts all such ISPs at a great competitive disadvantage. See *Computer II*, 77 F.C.C.2d 384, ¶ 231.

Under the nondiscrimination rules applicable to common carriers, in contrast, there would be a level playing field. Absent regulatory forbearance by the Commission, the cable companies would be required to sell the telecommunications link to respondent ISPs on nondiscriminatory terms. With a level playing field with respect to the telecommunications link, subscribers would have the benefit of competition between independent ISPs and the cable companies on the basis of the unregulated information services bundle that each offers. There is no reason to believe that Congress intended to give facility owners an advantage in the provision of information services.

2. The Commission cannot avoid the foregoing on the theory that it supposedly has "jurisdiction" to impose "regulatory obligations on providers of information services" under "Title I of the Communications Act, 47 U.S.C. 151-161,

which provides the agency authority over interstate and foreign communications." FCC Br. 4 (citing 47 U.S.C. 151, 152(a); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167-68 (1968)). That turns the regime Congress enacted—presumptive regulation of common carriage, subject to regulatory forbearance—on its head. In any event, to the extent that the Commission means that it has authority to apply regulations similar to those that apply to common carriers (the only kind of regulation that has any meaning here), it is incorrect.

The regulatory requirements of the Act generally spring from title II (not title I) and apply almost without exception only to "carriers" or "common carriers," terms that the Act treats as synonymous. See 47 U.S.C. 153(10). The definition of "telecommunications carrier" includes the limitation that a carrier "shall be treated as a common carrier under this Act *only* to the extent that it is engaged in providing telecommunications services." *Id.* § 153(44) (emphasis added). Accordingly, unless the "telecommunications" that the Commission concedes is being purchased by millions of subscribers is also a "telecommunications service"—precisely the conclusion the Commission rejected in this proceeding—the Commission may not impose common carrier regulations on providers of that ubiquitous transmission service. See *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 705 (1979) (relying on "unequivocal" statutory language in 47 U.S.C. 153(10) providing that a radio broadcaster shall not be treated as a common carrier "insofar as such person is so engaged" in broadcasting).

A partial list of the statutory sections that the Commission's interpretation would make inapplicable to the transmission element of cable modem service illustrates the extraordinary consequences of the Commission's reading: section 10[8]

[8] 47 U.S.C. 160. For all sections of the Act in title II, the section numbers of the Act and the U.S. Code section numbers in title 47 are the same. Accordingly, the U.S. Code sections are not individually cited here, although they are referenced in the Table of Authorities.

(Commission authority to forbear from applying provisions of the Act or regulations with respect to telecommunications carriers or telecommunications services); section 201 (common carrier to provide service upon request); section 202 (unlawful for common carrier to discriminate); section 206 (common carrier liable for damages for violating the Act); section 207 (person damaged by common carrier may file complaint); section 209 (Commission may order carrier to pay damages); section 214 (only common carrier may construct and operate communications facilities); section 222 (duty of telecommunications carrier to protect customer information); section 228 (common carriers protected from liability for transmitting pay-per-call services); section 251 (telecommunications carriers have duty to interconnect networks)[9]; section 253 (states may not prohibit provision of telecommunications service); section 254 (universal service is an evolving level of telecommunications services); section 255 (providers of telecommunications service must ensure accessibility by disabled persons); and section 621(b)(3) [47 U.S.C. 541(b)(3)] (prohibiting franchising authorities from regulating telecommunications services provided over a cable system).

The Commission's decision holds that no part of cable modem service is a telecommunications service. Accordingly, none of the provisions listed immediately above may be applied to the transmission component of cable modem ser-

[9] The duty of telecommunications carriers to interconnect their networks provides a striking example of the chaos that the FCC's interpretation would cause. Unless the transmission underlying information services is a telecommunications service, the requirements at 47 U.S.C. 201(a), 251(a) and 332(c)(1)(B) that every common carrier interconnect with the facilities and equipment of other common carriers would not apply, and the interconnected "network of networks" that makes up the Internet and the rest of the national communications infrastructure would cease to function.

vice. Cable modem service is offered to millions of people. These services are delivered over lines that use public rights of way, are advertised ubiquitously to the public, and are sold as standard offerings at non-negotiable, off-the-shelf rates. See EarthLink Ninth Circuit Supplemental Excerpts of Record (EarthLink S.E.R.) 0235-37. Despite these characteristics, the Commission has—on the theory that Congress formed no intention regarding the application of its comprehensive regulatory regime to these ubiquitous public offerings—implausibly read the statute to remove the transmission component of cable modem service from the reach of virtually every otherwise applicable statutory provision whenever a carrier decides to market that telecommunications with information services.

III. THE COMMISSION'S CONTRARY ARGUMENTS REGARDING THE STATUTORY TEXT LACK MERIT.

The FCC attempts to avoid the plain meaning of the definition of telecommunications service, a definition that the Commission has conceded that Congress intended to mirror the framework of the *Computer Inquiries* and AT&T MFJ. It contends that the statute simply does not address the question of how to characterize bundled offerings. Alternatively, the FCC suggests that the communications component of cable modem service does not fit within the terms of the definition of "telecommunications service" because it does not include "telecommunications." Finally, it contends that because cable modem service is an "information service," it follows under the statute that cable modem service cannot include a "telecommunications service"; that is, that information services and telecommunications services are "mutually exclusive." Each of those arguments is meritless.

A. It Is Not Plausible to Believe that Congress Left Unresolved the Fundamental Question of How to Determine Which Services Constitute Common Carriage.

The FCC contends that this is a case of "statutory silence" (Br. 14) because "[t]he Communications Act does not mention cable modem service or expressly state how the Commission should classify and regulate that service" (*id.* at 3). The Act also does not mention facsimile transmission, or DSL, or frame relay service, or T-1 lines, or fiber-optic cable. Yet the Commission has never before contended, and cannot plausibly argue, that Congress was not aware of or did not intend for the Act to cover those services. As this Court has observed with respect to the Transportation Act of 1940, "[t]he very complexities of the subject have necessarily caused Congress to cast its regulatory provisions in general terms." *American Trucking Ass'ns* v. *Atchison, Topeka, & Santa Fe Ry. Co.*, 387 U.S. 397, 409 (1967). See also *United States* v. *Monsanto*, 491 U.S. 600, 608-09 (1989) (failure to mention particular application of statutory term "'does not demonstrate ambiguity' in the statute: 'It demonstrates breadth.'" (internal citations omitted)).

It is not plausible to believe that Congress intended to delegate to the Commission through silence or ambiguity the bedrock question—on which fundamental aspects of federal regulation turn—of how to decide who qualifies as a common carrier. That is especially true given that the only apparent purpose of adding the terms "telecommunications service" and "telecommunications carrier" to the Act was to address that very question.[10]

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[10] Even if this case were more narrowly regarded as addressing only the regulatory classification of cable modem service—as opposed to bundled offerings generally—it would not be reasonable to conclude that Congress left that question to the Commission's discretion. At the time it considered and passed the 1996 Act, Con-

The definition of telecommunications carrier also includes the exception that proves the rule that Congress did not delegate to the Commission the task of generally determining how to decide who is and who is not a common carrier. The definition of telecommunications carrier—after specifying the general statutory requirement—adds the caveat "that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage." 47 U.S.C. 153(44). Congress thus clearly knew how to confer the authority now claimed by the Commission, but it did not do so here.

In *MCI* v. *AT&T*, 512 U.S. 218 (1994), this Court rejected a closely analogous argument by the Commission that

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gress was well informed of the emergence of broadband technologies, including cable modem service. "Cable companies had begun providing high-speed Internet service, as well as traditional cable television, over their wires even before 1996." *National Cable & Telecomms. Ass'n* v. *Gulf Power Co.*, 534 U.S. 327, 331 (2002). In 1995 the General Accounting Office delivered to every member of Congress a report on the "Information Superhighway" identifying the "primary challenge" in the "near term" as "provid[ing] broadband digital services over the existing plant—the hundreds of thousands of miles of copper wire and coaxial cable." GAO, *Information Superhighway: An Overview of Technology Challenges, Report to Congress* (Jan. 1995) at 59-60. Petitioner NCTA (then operating as the National Cable Television Association) emphasized to Congress in 1995 that cable represented the ideal competitor to the dial-up technology of telephone networks: "Our systems today pass over 95 percent of homes in the U.S., and carry up to 900 times more information than telephone facilities. Already several leading cable companies are building state-of-the-art communications facilities that deliver voice, video and data over the same wire. Put simply, if this committee wants to bring competition to the local phone monopoly, we are it." *Telecommunications Policy Reform: Hearings before the Senate Committee on Commerce, Science, and Transportation*, 104th Cong. (1995), S. Hrg. 104-216, at 2 (testimony of NCTA President Decker Anstrom).

Congress by statutory ambiguity had delegated to it the power to eliminate tariff filing. "It is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id.* at 231. The claimed delegation here is even more fundamental, because the Commission now asserts the power to determine that virtually all broadband interstate wire transmission services are not only unregulated, but *unregulable* as common carrier services. See *supra* Part II.C.2. Adding to the implausibility that Congress made such a fundamental delegation is the means by which the Commission claims that delegation was carried out: silence.

B. The Statutory Text Refutes the Commission's Arguments that the Telecommunications Component of Cable Modem Service Does Not Fit Within the Definition of Telecommunications Service.

1. The Commission's Assertion that Cable Modem Service Does Not Include a Telecommunications Service Because It Does Not Include "Telecommunications" Is Wrong and Internally Contradictory.

a. Respondents demonstrated in Part II.A, *supra*, that there is no merit to the Commission's claim that the telecommunications component of cable modem service must be offered on a "stand-alone basis" to satisfy the definition of a "telecommunications service." The statutory text imposes no such requirement.

b. The Solicitor General, seemingly recognizing that the Commission's position has no foundation in the text, attempts to resuscitate it through another statutory provision. Advancing an argument that did not form the basis of the Commission's ruling below, the government contends that cable mo-

dem service is not a "telecommunications service" because it does not include the required "telecommunications." The Act defines the latter term as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43). Cable modem service, the government now contends, fails this test because it "involves the general capability for changing the form or content of information." FCC Br. 15. "[B]ecause the cable operator does not *offer* transparent transmission capacity in such a way that the subscriber can use it *without* a corresponding change in the form or content of the information transmitted, the cable operator is not providing a telecommunications service." *Id.* at 24 (emphases in original).

That claim fails for three separate reasons. First, as discussed *supra* Part I, the subscriber *is* able to use the transmission apart from the information processing features of the bundled service. The subscriber can instead use third-party e-mail services and the like.

Second, contrary to the government's argument, a service does not cease to provide telecommunications if it in some respect "involves the general capability" to change the content or form of information. FCC Br. 15. Instead, under the plain terms of the definition, a service includes "telecommunications" so long as the "*transmission*" does not produce a "change in the form or content of the information as sent and received." 47 U.S.C. 153(43) (emphasis added). There is no argument that the high-speed communications pipeline provided by cable modem service changes subscribers' information in the course of transmission. Indeed, if subscribers could not be sure that, for example, the content of their e-mails would not be changed during transmission, few people would use the service. The fact that some *other* component of cable modem service—specifically, its information processing functions performed by computers at the ends of the transmission network—may change the information *apart*

from the transmission does not affect whether telecommunications are provided in the first instance.

Third, and perhaps most important, the government's "telecommunications" argument is *entirely* self-defeating. If the Commission were correct that cable modem service does not include "telecommunications," then cable modem service equally is not, as the Commission claims, an "information service." The term information service is defined to include only those information processing functions that are delivered "via telecommunications." 47 U.S.C. 153(20).

2. *Information Services and Telecommunications Services Are Not "Mutually Exclusive."*

The Commission argues that cable modem service is an "information service" under the Act. Pet. App. 95a. Standing alone, that argument proves nothing because the issue is whether cable modem service (however it is characterized as a bundled offering) *includes* a telecommunications service—namely, the high-speed telecommunications pipeline. Respondents do not contend that the information service bundle as such is regulated. Rather, respondents contend, and the Ninth Circuit agreed, that the telecommunications component retains its separate regulatory status under the definition of "telecommunications service."

Therefore, in order for its *Declaratory Ruling* to be upheld, the Commission must prevail on its argument that the terms information service and telecommunications service are "mutually exclusive." Pet. App. 97a. That contention is merely a reprise of its flawed reliance on the definition of telecommunications. According to the Commission:

> [A] "telecommunications service" is the "offering of telecommunications for a fee directly to the public," and the item offered to the public—"telecommunications"—must be a "transmission * * * of information * * * without change in the form or content of the information as sent and received." An information service, by contrast,

> generally *does* result in a change to the form or content of the transmitted information in some manner. Therefore, the Commission concluded, the categories of "telecommunications service" and "information service" are "mutually exclusive."

FCC Br. 5-6 (emphasis in original) (internal citations omitted). This argument seriously misreads the text of the statute for the reasons just described. In cable modem service, the "transmission" does not change the form or content of information. If the Commission's contrary view were correct, cable modem service would not be an "information service" because it would not be provided "via telecommunications." 47 U.S.C. 153(20).

In addition, the plain language of the Act demonstrates that a particular offering may simultaneously be an "information service" and, in part, a "telecommunications service." Nothing about the statute suggests otherwise. Especially in light of the fact that the definitions of "information service," "telecommunications," and "telecommunications service" by their terms rely upon one another, it is exceedingly unlikely that Congress would have intended such a fundamental regulatory question as is presented here to be resolved by a silent inference that one term ("telecommunications") that is used to define a second term ("information service") cannot be given its defined meaning when it is used in a third term ("telecommunications service").

Finally, neither the terms of the statute nor its structure suggest that Congress intended that a bundled offering—even if considered an information service as a whole—would not encompass a regulable telecommunications service. To the contrary, when Congress intended that a particular service could not be subject to common carriage it explicitly said so. See 47 U.S.C. 153(10) (radio broadcasting may not be treated as common carriage); *id.* § 332(c)(2) (prohibiting common carrier regulation of private mobile services); *id.* § 641(c) (prohibiting common carrier regulation of cable service).

Congress also contemplated that a single entity could provide both telecommunications services and other services, and that neither classification would swallow the other. For example, a carrier "shall be treated as a common carrier under this Act *only to the extent that* it is engaged in providing telecommunications services." *Id.* § 153(44) (emphasis added). See also *id.* § 332(c)(1)(A) (commercial mobile service providers treated as common carriers "insofar as such person is so engaged"); *id.* § 571(a)(3) (title VI to apply "[t]o the extent that" common carrier provides video programming other than as prescribed).

3. *Cable Companies "Offer" Telecommunications, Rather Than Merely "Use" Telecommunications.*

The Commission's third and final argument relating to the definition of telecommunications service is that cable companies are "using" telecommunications to provide their information services, not "offering" telecommunications. Pet. App. 98a. Not so. As a statutory matter, it is the subscriber that is "using" the telecommunications component in the sense relevant to the Act. "Telecommunications" is "the transmission, between or among points specified by *the user*, of information of *the user's* choosing, without change in the form or content of the information as sent and received." 47 U.S.C. 153(43) (emphasis added). The user in this context—*i.e.*, the party that selects the information transmitted—is the subscriber, and not the cable company.

As a factual matter, it is plain that cable companies are "offering" the telecommunications component to their subscribers. No one doubts that the communications component has independent economic value to the subscriber, and hence to the cable company selling it. Indeed, if the cable company is not offering the transmission, who is? As Judge Thomas said in his concurring opinion below, "[u]nder the FCC's approach, the general public would be purchasing a service that nobody offered." Pet. App. 31a. For their part, the cable in-

dustry petitioners emphasize that the distinct telecommunications function is the defining characteristic of cable modem service that customers seek:

> The coaxial connection allows much greater bandwidth – and thus greater speed – than a dial-up connection. Moreover, the connection is "always on": the user need not "dial up" an ISP to initiate a session. *These qualities* made cable modem service very popular, and its growth has been explosive.

NCTA Br. 4 (citations omitted) (emphasis added). Customers buy cable modem service first and foremost for the speed of its telecommunications function. To say that a company does not "offer" precisely the service the customer seeks to buy is nonsensical.

C. Because Congress Adopted the Framework of the Commission's *Computer Inquiries* and the AT&T MFJ in the Definitional Provisions of the 1996 Act, the Commission Is Not Free to Reject that Framework Now.

The Commission recognizes that its construction of the term telecommunications services cannot be reconciled with the *Computer Inquiries* and the AT&T MFJ, which it previously acknowledged Congress adopted in 1996. See *supra* Part II.B. Unable to fit its conclusions into that framework, the Commission has chosen instead to reject it. Although petitioners' *amici* accuse the Ninth Circuit of "disregard[ing] [this] twenty-five year-old body of regulatory law interpreting the Act" (Telecomm. Indus. Ass'n Br. 5), the Commission cannot bring itself to make such an absurd assertion. Rather, the FCC is forced to concede that "[i]n the instant order, the Commission concluded that the regulatory framework adopted in the *Computer Inquiries* did not control its classification of Internet access services provided by cable operators." FCC Br. 35. It was only on this basis that the Commission was able to ignore its own clear rulings and those of

the courts concluding that the telecommunications component of bundled offerings retains its independent regulatory status.

The FCC's only explanation for its complete about-face with respect to the proper construction of the Communications Act is that it now regards the *Computer Inquiries* as "legacy regulatory structures developed in another era to address different concerns." FCC Br. 36 n.16. The straightforward answer is that Congress did not leave that choice to the Commission at the threshold of characterizing a particular offering. Not only did Congress adopt the framework of the *Computer Inquiries* and the AT&T MFJ, it *specifically provided* by statute that the definition of telecommunications service applies "regardless of the facilities used." 47 U.S.C. 153(46). It thus makes no difference whether dial-up telephone service, DSL, or cable wires are involved. Although Congress did empower the Commission to account for different technologies and the state of different markets—and on that basis to determine how to regulate various telecommunications services—it did so through the statute's forbearance procedures, see 47 U.S.C. 160, *not* the antecedent question of how the service is classified.[11]

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[11] The FCC states that "cable operators providing cable modem service have never been viewed as common carriers." FCC Br. 36. But that is not only irrelevant to the question of classification, it is true only as a consequence of the Commission's own inaction. Moreover, in fact, cable companies are not strangers to common carriage. They sued the Commission and won the right to be recognized as local exchange carriers in *City of Dallas, TX* v. *FCC*, 165 F.3d 341, 353 (CA5 1999) (rejecting Commission claim that statute providing privileges to local exchange carriers was "silent" with respect to cable companies that also operated as local exchange carriers). Cable companies also have been providing tariffed telecommunications services for years as state-certificated common carriers over the same networks they use to provide Internet access services. See EarthLink Reply Comments in GN Docket No. 00-185, at 1-5, reproduced in EarthLink S.E.R. at 0229-0234.

The Commission has moreover emphasized that the Telecommunications Act of 1996 must be construed in light of the fact that, "at the time the statute was enacted, the Computer [Inquiries] framework had been in place for sixteen years." As a result, "a decision by Congress to overturn [the] Computer [Inquiries]" would have constituted "a major change in regulatory treatment" that ought not be implied. *Universal Service Report to Congress*, 13 F.C.C.R. at 11,524, ¶ 45. The Commission could find no persuasive evidence of "an intent by Congress to do so. As a result, looking at the statute and the legislative history as a whole, we conclude that Congress intended the 1996 Act to *maintain the Computer [Inquiries] framework*." *Ibid.* (emphasis added). In its ruling in this case, the Commission once again found no persuasive evidence of a Congressional intent to abandon the definitional framework of the *Computer Inquiries*; it simply abandoned that framework itself. The Commission does not have that power.

IV. THE COMMISSION'S REMAINING ARGUMENTS DO NOT JUSTIFY ITS DEPARTURE FROM THE STATUTORY TEXT.

A. Congress Addressed the Question Whether Telecommunications Services Should Be Deregulated Through the Statutory Forbearance Regime, Not the Antecedent Question Whether an Offering Constitutes a Telecommunications Service.

The FCC contends that its construction is supported by Congress's general deregulatory goals in the 1996 amendments to the Communications Act. Br. 2. But that argument founders on the fact that Congress in the 1996 Act, as in most statutes, did not pursue one goal to the exclusion of all others. Rather, it balanced numerous concerns, including the substantial need for regulation in order to protect consumers and further universal service. Regulation of telecommunications facilities and services has been the rule, not the exception, since the inception of federal regulation in the 1880s. The 1996

Act updated that regulatory structure, rather than abandoning it. The Commission itself previously recognized that regulating carriers providing telecommunications service—the approach it rejected here—appropriately balanced the interests Congress was pursuing. "Limiting carrier regulation to those companies that provide the underlying transport ensures that regulation is minimized and is targeted to markets where full competition has not emerged." *Universal Service Report to Congress*, 13 F.C.C.R. at 11,546, ¶ 95.

In any event, the Commission's position cannot be reconciled with Congress's expression of its deregulatory goals. The Commission relies on section 706 of the 1996 Act, which directs the FCC and state commissions with authority over telecommunications services to use "price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment" with respect to "advanced telecommunications capabilities." 47 U.S.C. 157 note. See Pet. App. 46a-47a. But the Commission's reliance on section 706 is *totally inexplicable*. The first three methods specified by section 706 (including forbearance) apply *only* to common carriers covered by title II of the Act; that is, they apply *only* to "telecommunications services." The FCC's construction is irreconcilable with the clear directive of section 706 because it deems cable modem service not to include a telecommunications service.

The decision of the Ninth Circuit, by contrast, designates the transmission component of cable modem service as a common carrier telecommunications service, subject to the Commission's forbearance authority codified at 47 U.S.C. 160. That section allows the Commission to "forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services," provided that the test set forth in that section is met. *Ibid.*; see also *AT&T* v. *City of Portland*, 216 F.3d at 879

(noting Commission's "broad authority to forbear from enforcing the telecommunications provisions if it determines that such action is unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest"). Specifically, the Commission "shall forbear from applying any regulation or provision of this Act" that is not necessary to prevent discrimination, protect consumers, or protect the public interest. 47 U.S.C. 160(a).

Congress intended that these forbearance procedures—rather than the antecedent characterization of a particular offering as an information service—would provide the mechanism to account for the changing conditions in the telecommunication markets. The salient features of the forbearance authority are that it provides a fifteen-month deadline and substantial procedural protections to affected consumers and competitors.[12] The Commission itself ostensibly directed that the "debate over issues such as independent ISP access to cable facilities should take place" *not* in the determination of the regulatory classification of cable modem service, but in a separate proceeding addressing "what federal regulatory obligations" should apply. FCC Br. 32. But, by defining the transmission services of cable-based Internet service providers entirely out of the common carrier regime—indeed, entirely out of the *statutory* scheme—the FCC impermissibly seeks to remove the statutory constraints Congress imposed through the forbearance regime.

It is therefore essential to recognize that the Ninth Circuit in this case did not resolve the ultimate question whether the

[12] The Commission has promptly resolved several forbearance proceedings in the past, see, *e.g.*, *MCI Worldcom* v. *FCC*, 209 F.3d 760 (CADC 2000), and there are indeed multiple petitions pending before the Commission with respect to the very title II relief at issue here, see, *e.g.*, *Petition of Verizon Telephone Companies For Forbearance Under 47 U.S.C. § 160(c) From Title II and Computer Inquiry Rules With Respect To Their Broadband Services*, WC Docket 04-440 (filed Dec. 20, 2004).

FCC must subject cable modem service to common carrier obligations. It decided only the question of categorization, which is in turn the only question now before this Court. And its holding that cable companies cannot escape their common carrier obligations through the nicety of bundling is obviously right. The Ninth Circuit left it to the FCC in the first instance to determine on remand, under the criteria Congress specified in 47 U.S.C. 160, whether to lift cable companies' common carrier obligations. That judgment should be affirmed and the Commission permitted to make the appropriate findings with respect to forbearance in light of the record before it.

B. The Private Petitioners' Arguments Regarding the Commission's Treatment of Non-Facilities-Based ISPs Have No Application to Cable Modem Service Provided By Network Owners.

NCTA argues (Br. 22-23) that respondents prove too much by demonstrating that the plain language of the Act specifies that the transmission component of cable modem service is a telecommunication service. NCTA urges that respondents' construction would make non-facilities-based information service providers—*i.e.*, providers that, in contrast to cable companies, do not own telecommunications networks—common carriers. Because they have not been treated as such in the past, NCTA reasons, that outcome could not have been contemplated by Congress. NCTA's argument is flawed because it assumes that the deregulation of non-facilities-based ISPs turns on the definitions in the Act. It does not; it turns on forbearance.

In order to understand fully the rule that Congress incorporated into the definitions that it adopted in 1996, it is necessary to understand a distinction that the Commission drew in the *Computer Inquiries* between facilities-based and non-facilities-based providers of information services. The Commission applied the same *definitional* framework with respect to both types of carriers. It held that, while the "enhanced" bundled offering of both types of carriers was unregulated,

the telecommunications component of that bundled offering was a regulated "basic," common carrier service. See *supra* Part II.B. However, the Commission determined that duplicate regulation of that basic service—first when provided by the facility owner and again when resold by the non-facilities-based carrier—was not required. "Deregulation of entities that do not have underlying facilities and that obtain transmission capacity from others pursuant to their tariffs is sensible; no policy goal is served by regulating any aspect of these entities' offerings." *Third Computer Inquiry*, Proposed Rule, 50 Fed. Reg. 33,581, 33,588, ¶ 46 n.34 (1985). In the terminology of the Communications Act as amended in 1996, the Commission decided to forbear from regulating the telecommunications service within the information service provided by non-facilities-based providers.[13] But by contrast—and this is the critical distinction for purposes of this proceeding, which involves the owners of cable networks—the Commission determined that common carriage regulation must apply to the telecommunications component of offerings by facilities-based carriers.

The distinction drawn by the Commission between facilities-based and non-facilities-based carriers also explains why a great deal of what the Commission relies upon from its *Universal Service Report to Congress* is inapplicable here. The Commission itself acknowledges, but does not explain, the significance of the distinction when it concedes that "[i]n the *Universal Service Report*, the Commission did not resolve the regulatory classification of 'cable operators providing Internet access,' 13 F.C.C.R. at 11535 n.140, or other information service providers that provide service using their own transmission facilities, see *id.* at 11530 ¶ 60." FCC Br. 8. Thus, to the

[13] See *Computer & Comms. Indus. Ass'n* v. *FCC*, 693 F.2d 198, 212 (CADC 1982) ("Our approval of limited forbearance from Title II regulation of common carrier services by the Commission does not give the Commission unfettered discretion to regulate or not regulate common carrier services.").

extent that the *Report* speaks of the transmission component of Internet access service historically not being regulated as common carriage, it is referring to the act of forbearance that the Commission undertook with respect to non-facilities-based providers twenty-five years ago. The rule that the Commission and the courts have applied time and again in the intervening period, however, and the rule of which Congress was aware and adopted, treats the transmission component of information services offered by facilities-based providers—such as cable companies—as a common carriage telecommunications service. See *supra* Part II.B.

C. The Commission's *Declaratory Ruling* Cannot Be Sustained on the Basis of *Chevron* Deference.

The FCC's construction cannot be saved on the ground that the relevant definitions of the Act are ambiguous, such that under *Chevron U.S.A. Inc.* v. *National Resources Defense Council, Inc.*, 467 U.S. 837 (1984), the Commission is entitled to adopt any reasonable interpretation. Even if *Chevron* deference applies, respondents prevail because the Commission's construction is unreasonable.

Perhaps the most telling feature of the Commission's brief is that it does not even attempt to argue that it has adopted the best construction of the Act. *Chevron* deference is precluded here by the plain text of the statute, its history, and its overall structure. "Even for an agency able to claim all the authority possible under *Chevron*, deference to its statutory interpretation is called for only when the devices of judicial construction have been tried and found to yield no clear sense of congressional intent." *General Dynamics Land Sys.* v. *Cline*, 540 U.S. 581, 600 (2004).

This Court's precedents moreover establish that the argument for *Chevron* deference is substantially undercut when an agency inconsistently construes the governing statute. "An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view."

INS v. *Cardoza-Fonseca*, 480 U.S. 421, 447 n.30 (1987) (internal citation omitted). Here, not only is the conflict between the Commission's current construction of the statute and its prior precedent (including its post-1996 precedent) stark, its new interpretation is unreasonable. The FCC simply rejected its own settled understanding that Congress intended to adopt the framework of the *Computer Inquiries* and the AT&T MFJ with the sole "explanation" is that its prior interpretations of the Act were only intended to apply to telephone lines, not cable facilities. Pet. App. 101a-102a. That is a distinction that the FCC itself admits is impermissible under the Act's facilities-neutral terms. See *id.* 90a. It moreover completely failed to acknowledge or distinguish the policy concerns underlying its own precedent, including particularly its recognition that allowing carriers to decide their own regulatory status on the basis of how they bundled their services would undermine the entire statute. See *supra* Part II.B.

The Commission also ignores the significant contradiction in its construction of the term "information service" in the Communications Act and the almost identically defined term in a parallel statute, the Communications Assistance for Law Enforcement Act (CALEA). 47 U.S.C. 1001 et seq.[14] Under CALEA, "telecommunications carriers" are required to design and build their networks so as to make them accessible to law enforcement agencies conducting lawful electronic surveillance and intercepts. See *id.* § 1002. The definition of "telecommunications carrier," however, expressly excludes "persons or entities insofar as they are engaged in providing information services." *Id.* § 1001(8)(C)(i). The Commission acknowledges that the definitions of "information service" in the Communications Act and CALEA are almost indistinguishable. *Communications Assistance for Law Enforcement*

[14] The CALEA definition of "information services," 47 U.S.C. 1001(6), is identical in operative part to the definition of "information service" at 47 U.S.C. 153(20) and is set forth in full in the Appendix to this brief at 9a-10a.

Act and Broadband Access and Services, 19 F.C.C.R. 15,676, 15,705, ¶ 50 (2004) (CALEA NPRM). Because that is the case, the Department of Justice, including expressly the Office of the Solicitor General, wrote to the Commission and "stated its belief that the Commission's *Cable Modem Declaratory Ruling*, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA." EarthLink BIO App. 14a.

To try to avoid the outcome under CALEA that these law enforcement officials recognized would result from the *Declaratory Ruling* in this case, the Commission initiated a rulemaking on the application of CALEA to broadband Internet services. There, the Commission has proposed to read the relevant definitions, including the definition of "information services" so that a facilities-based cable company that is providing both transmission and information services such as e-mail "by definition * * * cannot be providing an information service for purposes of CALEA." CALEA NPRM at 15,706 ¶ 50. Thus, in contrast to its holding in the *Declaratory Ruling* that Internet access service is *entirely* an information service, the Commission in its CALEA docket has proposed to construe the term information services in such a way that cable modem service would "by definition" *never* be an information service. Such shenanigans are not the stuff of deference.

Finally, the Commission's claim to deference is substantially undercut by the fact that the Commission adopted its interpretation against the backdrop of the *judicial* construction of the statute by the Ninth Circuit in the *City of Portland* decision. Although the court of appeals correctly deemed itself bound by *stare decisis* because that prior decision rested on the statute's plain meaning (see Pet. App. 18a-19a (citing *Mesa Verde Construction Co.* v. *Northern Cal. Dist. Council of Laborers*, 861 F.2d 1124, 1136 (CA9 1988) (en banc)), we agree with petitioners that this Court is of course not bound by that ruling. We also agree that the Commission logically

was not required as a matter of law to adhere to *City of Portland* in announcing a national standard in this case.

Nonetheless, it cannot be the case that the Commission was empowered to ignore entirely the substance of the judicial construction of the Communications Act in *City of Portland*. Cf. *Neal* v. *United States*, 516 U.S. 284, 294-95 (1996). If basic principles of administrative law obligate an agency to give a reasoned explanation for its departure from prior agency practice, see *Motor Vehicle Mfrs. Ass'n* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983), it follows *a fortiori* that it must give a substantial explanation for its refusal to follow prior judicial precedent.

Yet, just as the Commission failed to address its own prior understanding of the Communications Act, so too it failed to address the substance of the Ninth Circuit's reasoning in *City of Portland*, dismissing the decision out of hand with the entirely procedural assertions that the Ninth Circuit did not have (1) the "benefit of briefing by the parties or the Commission" on the issue, Pet. App. 116a, or (2) the benefit of the "comprehensive" record the Commission had compiled in its proceeding below, *id.* 115a. The reason that the lower court did not have "the benefit" of the Commission's thinking however, is that the Commission, although participating as amicus, chose not to provide its views. See *City of Portland*, 216 F.3d at 876. Moreover, the Commission's emphasis on the lack of a comprehensive record before the *Portland* court contrasts sharply with its recognition that the question presented is purely one of law. See United States' Motion for Leave to Dispense with Preparation of a Joint Appendix (granted Jan. 24, 2005).

CONCLUSION

The judgment should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX

1. Section 3 of the Communications Act [47 U.S.C. 153] provides in pertinent part:

Definitions.

For the purposes of this Act, unless the context otherwise requires—

* * * *

(10) Common Carrier.

The term "common carrier" or "carrier" means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or in interstate or foreign radio transmission of energy, except where reference is made to common carriers not subject to this Act; but a person engaged in radio broadcasting shall not, insofar as such person is so engaged, be deemed a common carrier.

* * * *

(20) Information Service.

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

* * * *

(43) Telecommunications.

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications Carrier.

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

* * * *

(46) Telecommunications Service.

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

* * * *

(48) Telephone Toll Service.

The term "telephone toll service" means telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.

* * * *

2. Section 10 of the Communications Act [47 U.S.C. 160] provides:

Competition in Provision of Telecommunications Service.

(a) Regulatory Flexibility.

Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive Effect to be Weighed.

In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

(c) Petition for Forbearance.

Any telecommunications carrier, or class of telecommunications carriers, may submit a petition to the Commission requesting that the Commission exercise the authority granted under this section with respect to that carrier or those carriers, or any service offered by that carrier or

carriers. Any such petition shall be deemed granted if the Commission does not deny the petition for failure to meet the requirements for forbearance under subsection (a) within one year after the Commission receives it, unless the one-year period is extended by the Commission. The Commission may extend the initial one-year period by an additional 90 days if the Commission finds that an extension is necessary to meet the requirements of subsection (a). The Commission may grant or deny a petition in whole or in part and shall explain its decision in writing.

(d) Limitation.

Except as provided in section 251(f), the Commission may not forbear from applying the requirements of section 251(c) or 271 under subsection (a) of this section until it determines that those requirements have been fully implemented.

(e) State Enforcement After Commission Forbearance.

A State commission may not continue to apply or enforce any provision of this Act that the Commission has determined to forbear from applying under subsection (a).

3. Section 201 of the Communications Act [47 U.S.C. 201] provides:

Service and Charges.

(a) It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefor; and, in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such

charges, and to establish and provide facilities and regulations for operating such through routes.

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful: *Provided,* That communications by wire or radio subject to this Act may be classified into day, night, repeated, unrepeated, letter, commercial, press, Government and such other classes as the Commission may decide to be just and reasonable, and different charges may be made for different classes of communications: *Provided further,* That nothing in this Act or in any other provision of law shall be construed to prevent a common carrier subject to this Act from entering into or operating under any contract with any common carrier not subject to this Act, for the exchange of their services, if the Commission is of the opinion that such contract is not contrary to the public interest: *Provided further*, That nothing in this Act or in any other provision of law shall prevent a common carrier subject to this Act from furnishing reports of positions of ships at sea to newspapers of general circulation, either at a nominal charge or without charge, provided the name of such common carrier is displayed along with such ship position reports. The Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act.

4. Section 202 of the Communications Act [47 U.S.C. 202] provides:

Discrimination and Preferences.

(a) It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any

particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

(b) Charges or services, whenever referred to in this Act, include charges for, or services in conjunction with, the use of common carrier lines of communication, whether derived from wire or radio facilities, in chain broadcasting or incidental to radio communication of any kind.

(c) Any carrier who knowingly violates the provisions of this section shall forfeit to the United States the sum of $6,000 for each such offense and $300 for each and every day of the continuance of such offense.

5. Section 251 of the Communications Act [47 U.S.C. 251] provides in pertinent part:

Interconnection.

(a) General Duty of Telecommunications Carriers.—Each telecommunications carrier has the duty—

(1) to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers; and

(2) not to install network features, functions, or capabilities that do not comply with the guidelines and standards established pursuant to section 255 or 256.

* * * *

(i) Savings Provision.—Nothing in this section shall be construed to limit or otherwise affect the Commission's authority under section 201.

6. Section 332 of the Communications Act [47 U.S.C. 332] provides in pertinent part:

Intercommunication in Mobile Service.

* * * *

(c) Regulatory Treatment of Mobile Services.—

(1) Common Carrier Treatment of Commercial Mobile Services.—(A) A person engaged in the provision of a service that is a commercial mobile service shall, insofar as such person is so engaged, be treated as a common carrier for purposes of this Act, except for such provisions of title II as the Commission may specify by regulation as inapplicable to that service or person. In prescribing or amending any such regulation, the Commission may not specify any provision of section 201, 202, or 208, and may specify any other provision only if the Commission determines that—

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory;

(ii) enforcement of such provision is not necessary for the protection of consumers; and

(iii) specifying such provision is consistent with the public interest.

* * * *

(B) Upon reasonable request of any person providing commercial mobile service, the Commission shall order a common carrier to establish physical connections with such service pursuant to the provisions of section 201 of

this Act. Except to the extent that the Commission is required to respond to such a request, this subparagraph shall not be construed as a limitation or expansion of the Commission's authority to order interconnection pursuant to this Act.

* * * *

(2) Non-Common Carrier Treatment of Private Mobile Services. —A person engaged in the provision of a service that is a private mobile service shall not, insofar as such person is so engaged, be treated as a common carrier for any purpose under this Act. * * *

* * * *

7. Section 621 of the Communications Act [47 U.S.C. 541] provides in pertinent part:

General Franchise Requirements.

* * * *

(c) Any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service.

* * * *

8. Section 651 of the Communications Act [47 U.S.C. 571] provides in pertinent part:

Regulatory Treatment of Video Programming Services.

(a) Limitations on Cable Regulation.—

* * * *

(3) Cable Systems and Open Video Systems.—To the extent that a common carrier is providing video programming

to its subscribers in any manner other than that described in paragraphs (1) and (2)—

(A) such carrier shall be subject to the requirements of this title, unless such programming is provided by means of an open video system for which the Commission has approved a certification under section 653; or

(B) if such programming is provided by means of an open video system for which the Commission has approved a certification under section 653, such carrier shall be subject to parts I through IV of this title only as provided in 653(c).

* * * *

9. Section 102 of the Communications Assistance for Law Enforcement Act [47 U.S.C. 1001] provides in pertinent part:

Definitions.

For purposes of this title—

* * * *

(6) The term "information services"—

(A) means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications; and;

(B) includes—

(i) a service that permits a customer to retrieve stored information from, or file information for storage in, information storage facilities;

(ii) electronic publishing; and

(iii) electronic messaging services; but

(C) does not include any capability for a telecommunications carrier's internal management, control, or operation of its telecommunications network.

* * * *

(8) The term "telecommunications carrier"—

* * * *

(C) does not include—

(i) persons or entities insofar as they are engaged in providing information services; and

(ii) any class or category of telecommunications carriers that the Commission exempts by rule after consultation with the Attorney General.

10. Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 153 [Reproduced at 47 U.S.C. 157 note] provides:

Advanced Telecommunications Incentives.

(a) In General.—The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry.—The Commission shall, within 30 months after the date of enactment of this Act and regularly thereafter, initiate a notice of inquiry concerning the availability of

advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Definitions.—For the purposes of this subsection:

(1) Advanced Telecommunications capability.—The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and Secondary Schools.—The term 'elementary and secondary schools' means elementary and secondary schools, as defined in paragraphs (14) and (25), respectively, of section 14101 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 8801).

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,

Petitioners,

v.

BRAND X INTERNET SERVICES, ET AL.

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, ET AL.

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT MCI, INC.

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STATEMENT OF THE CASE AND STATEMENT OF FACTS

This case involves the Federal Communication Commission's ("FCC" or "Commission") attempt to negate Title II of the Communications Act, 47 U.S.C. § 101 *et seq.* ("Act"). The FCC here concludes that cable operators providing telecommunications do not have Title II obligations so long as they unilaterally choose to bundle the telecommunications they are providing with information services. But the characteristics that led Congress to regulate telecommunications facilities are not changed when the owner of the facility chooses to combine its telecommunications services with its own Internet Service Provider ("ISP") service, and asserts the right to exclude all other ISPs from its network. In fact, it was just this kind of discrimination that led Congress to regulate telecommunications services in the first place.

The FCC's decision threatens to eliminate competition among ISPs that need access to cable broadband facilities to reach their customers. While that is bad enough, the decision's implications extend much further. Because all telecommunications carriers routinely bundle information services with their telecommunications offerings, the Commission's decision that such bundling exempts a service from regulation, when applied generally, will lead to the dismantling of the statutory structure governing the nations' transmission infrastructure, and will render Title II of the Communications Act a dead letter. A construction of the statute's definitions that negates the statute's central operating provision cannot stand based on pleas of deference to agency decisionmaking.

I. The Regulatory Background

A. Common Carriage and the 1934 Communications Act

In the Communications Act of 1934 Congress transferred regulatory control of communications services to the newly created FCC. In order to mitigate the problems that attended the telephone company's monopoly over the telephone network,[1] Congress imposed significant duties on the activities of "common carriers"—which the 1934 Act defined as "any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio."[2] Under Title II of the Act, common carriers were required to "furnish . . . communication service upon reasonable request therefor" to any member of the general public. 47 U.S.C. § 201. The Act also required common carriers to charge rates that were "just and reasonable" and nondiscriminatory. 47 U.S.C. §§ 201(b), 202.

B. The Regulatory Treatment of Enhanced Services

In the 1970s, data processing services began to grow in importance and became increasingly intermingled with communications services. The Commission had to determine the appropriate regulatory treatment of these services. The Commission concluded that there was no need to regulate data processing, which lacked the bottleneck and network

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[1] *See, e.g.*, 78 Cong. Rec. 8822 (1934) (statement of Sen. Dill) (discussing extent of telephone monopoly).

[2] 47 U.S.C. § 153(h) (1970). The D.C. Circuit has read that definition to reflect the common law of carriers. *Nat'l Ass'n of Regulatory Uti. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976) ("*NARUC I*"); *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601 (D.C. Cir. 1976) ("*NARUC II*").

characteristics of telecommunications. *See, e.g., In re Amendment of Section 64.702 of the Communication's Rules and Regulations*, 77 F.C.C.2d 384, ¶ 132 (1980) ("*Computer II*"). But the Commission also concluded that it needed to continue to apply common carrier requirements to transmission, as the Communications Act required it to do.

In a series of seminal decisions known as the "*Computer Inquiry*" cases, the Commission therefore drew a distinction between "basic" transmission services,[3] and "enhanced" services that were carried over those bottleneck transmission lines.[4] It concluded that "basic transmission services are traditional common carrier communications services," and "enhanced services are not." *Computer II* ¶ 119. Accordingly, it determined that basic transmission services must be regulated under Title II of the Communications Act. Enhanced services generally would remain unregulated, *Id.* ¶¶ 124-125, subject only to the FCC's Title I jurisdiction, which is "restricted to [matters] reasonably ancillary to the effective performance of the Commission's various responsibilities." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

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[3] *Id.* ¶ 93. As defined in the *Computer Inquiry* cases, basic service was "the common carrier offering of transmission capacity for the movement of information," which involves providing a communications path "for the analog or digital transmission of voice, data, video, etc. information." *Id.*

[4] Enhanced service is defined as "any offering over the telecommunications network which is more than a basic transmission service." *Computer II* ¶¶ 97-98. In particular, enhanced services are "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information." 47 C.F.R. § 64.702(a).

When carriers combined basic and enhanced services together and provided them over their own transmission facilities ("facilities-based carriers"), the Commission ensured continued application of the Act's mandates and the Commission's deregulatory policies by requiring the carriers to separately price the underlying transmission services and provide them to the public on a nondiscriminatory basis.[5] Otherwise, in the FCC's view, the requirements of Title II could be avoided in situations in which they should fully apply. *In re Independent Data Communications Mfrs. Ass'n, Inc.*, 10 F.C.C.R. 13,717, ¶ 44 (1995) ("*Frame Relay Order*").

C. The 1996 Act

In the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 66 ("the 1996 Act"), Congress amended the Communications Act, but did not alter the longstanding obligations of common carriers. 47 U.S.C. §§ 201-202. Instead it added new requirements applicable to "telecommunications carriers." Telecommunications carriers are defined as providers of "telecommunications services," *id.* § 153(44), which in turn are defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46). "Telecommunications" are defined as "the transmission, between or among points specified by the user, of

[5] In *re Amendment of Sections 64.702 of the Commission's Rules and Regulations*, 104 F.C.C.2d 958, ¶¶ 98-99, 154, 158 (1986) ("*Computer III*"); *see also In re Amendment to Sections 64.702 of the Commission's Rule of Regulations*, 2 F.C.C.R. 3072, ¶ 61 (1981) ("*Phase II Declaratory Ruling*") ("The guiding principle we follow is that carriers must provide efficient nondiscriminatory access to the basic service facilities necessary to support their competitor's enhanced services . . . through unbundled basic offerings.").

information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). The Commission has interpreted "telecommunications carriers" to be essentially synonymous with the "common carriers" previously regulated by the Act.[6]

Telecommunications carriers are required to interconnect with other carriers (regardless of whether the FCC concludes this is desirable, the standard under the 1934 Act) and to configure their networks so as not to frustrate interconnection with other carriers. 47 U.S.C. § 251(a)-(b). They are required to take a variety of steps to protect the public, such as protecting confidential information and paying for universal service. 47 U.S.C. §§ 221, 254(d). And some carriers (the Bell Operating Companies and other incumbent local exchange carriers) are subject to a series of additional obligations, essentially escalating a carrier's responsibilities based on the degree of its monopoly control. *Id.* §§ 251, 252, 271.

In an important sense, however, these are only presumptive requirements. Section 10 of the Act authorizes the FCC to "forbear" from application of any statutory or regulatory requirements if specified statutory criteria are satisfied. 47 U.S.C. § 160. *See, e.g., In re Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, ¶ 95 (2002) ("*Declaratory Ruling*"), Pet. App. 102a. Those criteria

[6] *In re AT&T Submarine Sys., Inc., Application for a License to Land and Operate a Digital Submarine Cable System*, 13 F.C.C.R. 21585, ¶ 6 (1998) ("[T]he term 'telecommunications carrier' means essentially the same as common carrier."), *aff'd, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921 (D.C. Cir. 1999); *accord In re Cable & Wireless, PLC, Application for a License to Land and Operate in the United States a Private Submarine Fiber Optic Cable*, 12 F.C.C.R. 8516, ¶¶ 12-13 (1997).

require the FCC to assess, *inter alia*, whether deregulation will lead to discriminatory practices, whether it will leave consumers unprotected, and whether it will deter "competition among providers of telecommunications services." 47 U.S.C. § 160(b).

In the 1996 Act, Congress also retained the existing distinction between these "telecommunications services" and "information services,"[7] which in most respects mirror the categories of "basic services" and "enhanced services." *In re Implementation of the Non-Accounting Safeguards of Section 271 and 271 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21,905, ¶¶ 102-103 (1996) ("*Non-Accounting Safeguards Declaratory Ruling*"). Congress did not impose any requirements on information services.

Congress further mandated that when the FCC determines whether a service is an information service or a telecommunications service it may not consider the nature of the facilities used to provide the service, whether they be cable or telephone facilities. 47 U.S.C. § 153(46); *Declaratory Ruling* ¶ 35, Pet. App. 90a. Congress expressly contemplated that cable facilities might be used to provide telecommunications services and therefore might require treatment as common carriage.[8] The Commission

[7] Information services are defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20).

[8] *See* 47 U.S.C. § 541(b)(3)(A) ("If a cable operator or affiliate thereof is engaged in the provision of telecommunications services—(i) such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services."); *id.* § 541(d)(2) (discussing state regulation of cable companies' provision of "any communications service other than cable service, whether offered on a common carrier or private contract basis"); *id.* § 522(7) (defining a "cable system" as "a facility . . . that is designed to provide cable service . . . , but such term does not include . . . a facility of a common carrier. . ., except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to the subscribers").

accordingly has treated telephone service as a telecommunications service even when offered over cable facilities. *See, e.g., Declaratory Ruling* ¶ 45, Pet. App. 102a.

Finally, the Commission has, on multiple occasions, considered the appropriate treatment of services that include both a telecommunications and an information service component, such as the cable modem service here. The Commission consistently has concluded until now that, although information services are presumptively exempt from regulation, the bundling together of telecommunications and information services does not exempt the telecommunications component of the service from regulation under Title II. Specifically, the Commission has always applied the rule that facilities-based carriers offering bundled services must separately offer transmission in order to ensure continued application of Act's common carrier requirements.[9] It has never before limited that requirement to any particular type of facilities. And it has specifically applied that requirement to broadband Internet access services, concluding that the bundling together of broadband transmission service with information services into an Internet access service does *not* eliminate the telecommunications service. *See, e.g., In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, ¶ 36 (1998) ("*Advanced Services Declaratory Ruling*"); *infra* pp. 35-37.

[9] *In re Policy and Rules Concerning the Interstate Interexchange Marketplace*, 16 F.C.C.R. 7418, ¶ 39 (2001) ("*CPE/Enhanced Services Bundling Declaratory Ruling*"); *Phase II Declaratory Ruling*, ¶ 61.

II. The FCC's Declaratory Ruling

In the *Declaratory Ruling*, the Commission for the first time directly addressed the question of whether broadband Internet access service is subject to the requirements of Title II of the Act when it is provided by a cable company ("cable modem service"). The Commission concluded that it is not.

Broadband Internet access service is a service that consumers purchase, typically through their cable company or phone company, that allows consumers to obtain a high speed "always on" connection to the Internet. As its name implies, the service principally provides "Internet access," the ability to send information to, and receive information from, the Internet. It is thus quintessentially a transmission service. However, the service typically also includes information service components, such as the ability to create a "web page" or to store emails, with the information necessary for the operation of these services stored on the cable companies' computers. In the FCC's parlance, the service is in this way a "mixed service," albeit one in which the transmission feature constitutes by far the largest component of the mixture.

The FCC here announced and applied a rule of general application that "mixed" services should always be considered exclusively "information services," and never be considered in any degree "telecommunications services." In the FCC's understanding, by definition a service can be one thing or the other, but it cannot be both. This is so, the FCC determined, because "'information service' and 'telecommunications service' definitions establish mutually exclusive categories of service." *Declaratory Ruling* ¶ 41, Pet. App. 97a. Accordingly, the FCC concluded that when information services are offered "as part and parcel" of an

"integrated" service that includes a transmission component, the entire service is an unregulated information service, and not a regulated telecommunications service. *Id.* ¶ 39, Pet. App. 97a.

By virtue of this construction of these definitions, unless a company chooses to offer transmission services to the public "as a stand-alone service," *id.* ¶ 42, Pet. App. 99a, without any bundled information service included, the company is an unregulated information service provider, and not a regulated telecommunications service provider.

Applying these principles, the Commission determined that cable modem service is an information service. The Commission found that cable modem service includes information service components such as e-mail storage, newsgroups, the ability to create a web page and other similar functions. *Declaratory Ruling* ¶ 38, Pet. App. 93a. The Commission then concluded that cable modem service is not also a telecommunications service because the "telecommunications component is not . . . separable from the data processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities." *Declaratory Ruling* ¶ 39, Pet. App. 96a. The Commission offered no explanation of what it means in saying the telecommunications component is not "separable." It acknowledged that the telecommunications component of the service could as a technical matter be separately offered, but suggested the key is that, "*[a]s currently provisioned*, cable modem service is a single, integrated service." *Id.* ¶ 38, Pet. App. 95a (emphasis added). Cable modem service "does not include a *stand-alone offering* of telecommunications service to subscribers." *Id.* ¶ 48, Pet. App. 104a (emphasis added).

After concluding that services that are not offered as stand-alone telecommunications services are not telecommunications services at all, the Commission then treated as a separate question whether it will apply the *Computer Inquiry* requirements to the service, so that the service providers would be *required* to unbundle and offer a separate transmission service. In the Commission's view, therefore, when a company offers anything other than a stand-alone telecommunications service, the question of whether the telecommunications component of that service is subject to Title II is not settled through application of the statutory distinction between telecommunications and information services, but rather by the Commission's independent assessment of whether the *Computer Inquiry* rules should be deemed applicable.

The Commission therefore went on to ask whether it should require cable modem operators to offer a "bare" transmission service which would meet the definition it had given for "telecommunications service." The Commission concluded that such unbundling should not be required. The Commission stated that it has never before applied the *Computer Inquiry* unbundling requirements to cable networks and it saw no reason to "extend" them in this fashion. The Commission added that it would waive the requirements if they were applicable. *Id.* ¶ 45, Pet. App. 102a.

The Commission based this conclusion on a concern that there may be policy reasons not to create an "open access" regime for cable modem service that would exist if Title II were applicable and the Commission decided not to forbear. *Id.* ¶¶ 46-47, Pet. App. 102a-104a. But the Commission's conclusion was not based on evaluation of these policy considerations. To the contrary, the Commission explained that it was simultaneously issuing a

notice of proposed rulemaking ("NPRM") asking whether it should exert its ancillary jurisdiction to require open access. *Id.* ¶¶ 77-78, Pet. App. 139a. It also concluded that if cable modem service were a telecommunications service, it *might* be appropriate to forbear from application of Title II requirements, but this could be determined only through the NPRM. *Id.* ¶ 95, Pet. App. 152a. The Commission therefore did not apply the statutory forbearance criteria.

III. The Court of Appeals' Decision

The Ninth Circuit ruled that the FCC's decision that cable modem service was not, at least in part, a telecommunications service violated the Act. Pet. App. 15a-16a. The Court relied on its prior conclusion in *City of Portland* in which it had held that "to the extent that [the cable company] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *AT&T Corp. v. City of Portland*, 216 F.3d 871, 878 (9th Cir. 2000). Judge Thomas further explained in his concurrence that the statute was not ambiguous on this point: Congress spoke precisely to the question at issue. Pet. App. 25a.

SUMMARY OF ARGUMENT

Petitioners argue that this is a case about deference to the FCC's "core federal policy" of "reducing regulatory impediments to the rapid deployment of broadband." U.S. Br. at 2. It is not. The *Declaratory Ruling* did not determine how little or how much regulation would be appropriate for cable modem service. Instead, the *Declaratory Ruling* left the question of "whether (and, if so, how) cable modem service should be regulated under the law" to a future rulemaking. *Declaratory Ruling* ¶ 7, Pet. App. 48a.

This case concerns instead a threshold issue: whether, when the FCC considers the appropriate regulatory treatment of cable modem service, it will do so pursuant to the requirements set out by Congress in the 1996 amendments to Title II of the Act, or instead whether is free to ignore these legislative directives. The FCC in particular has adopted a construction of the Act's definitions of "telecommunications service" and "information service" that operates to permit it to decide whether to apply Title II or not as it sees fit.

The plain meaning of the text of the these statutory definitions powerfully supports the Ninth Circuit's construction of the definitions, and militates against the FCC's contrary interpretation. As its name implies "Internet access service" is a service that provides transmission to and from the Internet—a classic telecommunications service. Nothing in the text of the definitions supports the FCC's view that the essential nature of the service is changed because the cable operators bundle it together with data storage and other information service components.

Moreover, the FCC's construction undermines the statute it is supposed to be implementing. All of Congress's reasons for regulating "naked" transmission services fully apply to a bundle of services that includes an information service component, so the Commission's decision to regulate one and not the other violates the central goals of the statute. The Commission's asserted policy of promoting cable modem and broadband services cannot justify an interpretation of "telecommunications service" that applies to all transmission media (wireline as well as cable), and to both narrowband and broadband services. A policy that subjects some of these service and not others to Title II is flatly inconsistent with the Act's directive that the definition of "telecommunications service" does not depend on the facilities used.

If the FCC's definition of "telecommunications service" were applied consistently, no company would ever be found to be offering a "telecommunications service," and so no carrier ever would be subject to the strictures of Title II. Instead, all companies that offer transmission services would be considered exclusively "information service providers." Since the FCC claims that it has broad and unguided discretion to regulate "information service providers" as it sees fit under Title I of the Act, the result of its construction of the definitions is to give to the FCC broad discretion to regulate without regard to the requirements of Title II.

The consequences of this new construction thus extend well beyond cable modem service or broadband services in general. Any owner of a transmission network can easily include an information service within its service offering. The effect of the FCC's new rule is therefore that *no* company is subject to Title II common carrier rules unless it chooses to make itself subject to those rules, or unless the FCC at its own discretion chooses to require the company to unbundle its service and offer naked transmission services to the public.

Since the FCC has chosen in the *Declaratory Ruling* to limit the "unbundling" requirements of its *Computer Inquiry Rules* to the owners of telephone lines, but not the owners of cable lines, currently only the owners of telephone lines are subject to Title II. And if the FCC, acting within its own discretion, chooses to eliminate the *Computer Inquiry* unbundling obligations of telephone operators (as it is considering doing, *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019, ¶ 27 (2002) ("*Broadband Framework NPRM*")), then the owners of telephone lines as well could

choose to free themselves of all Title II common carrier obligations. Title II would become a dead letter.

Those are the necessary consequences of the definitions the FCC defends here. But Congress could not possibly have intended that the body of law it created under the greatly expanded Title II be entirely discretionary, to be applied or not as the FCC sees fit. That is underscored by Congress's inclusion in the Act of a "forbearance" provision that gave the FCC the ability to forbear from Title II regulation, but only if strict statutory criteria were met. 47 U.S.C. § 160 The FCC's construction here renders that provision, and the whole of Title II, an irrelevancy.

The FCC's definitional sleight of hand also represents a radical and unexplained departure from a long line of FCC precedent that had held that a facilities-based provider may not shield its transmission network from regulation by "contaminating" it with an information service. Indeed, the FCC had previously applied this rule specifically to Internet access services offered by a facilities-based provider, concluding that the information services offered as part of the service did not change the nature of the basic regulated transmission service that the provider is offering.

For each of these reasons, the FCC's construction of the statutory definition fails under step one of the *Chevron* inquiry, because it does not "give effect to the unambiguously expressed intent of Congress." *Chevron, USA., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984). The Ninth Circuit properly declined to follow it.

ARGUMENT

I. The Plain Language of the Act Shows That Cable Modem Service Is a Telecommunications Service

A cable company that provides Internet access services over its own transmission facilities is providing information services, but also is providing a telecommunications service. While several of the applications typically provided in an Internet access service are information services (such as the ability to create a "web page"), most of what the end user purchases and values is raw, unadulterated transmission that sends information to, and receives information from, sites on the Internet.[10] In fact, a central, if not sole, emphasis in the sales pitches of cable operators is the speed of their transmission media, and its "always on" characteristic. *See* Cable Br. at 4 (explaining that speed and "always on" characteristic made cable modem service very popular). The *Declaratory Ruling* itself defines "'high-speed Internet access' in general as a service that 'enables consumers to communicate over the Internet at [high] speeds' . . . and that that enables subscribers to 'send and view content with little or no transmission delay.'" *Declaratory Ruling* ¶ 1 n.2, Pet. App. 41a-42a (quoting FCC Orders).

Such a transmission component of a "mixed" service, U.S. Br. at 26, squarely falls within the definition of

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[10] The service also provides the necessary transmission protocols that "facilitate the economical, reliable movement of information" over the transmission medium. *Frame Relay Order* ¶ 33. These too are components of a "telecommunication service," being expressly excluded from the definition of "information service." 47 U.S.C. § 153(20) (excluding use of information services "for the management, control, or operation of a telecommunications system or the management of a telecommunications service").

"telecommunications service." Cable modem service includes "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46) (definition of "telecommunications service"). Cable modem service is sold to the public for a fee. And cable modem service is overwhelmingly "telecommunications," which the Act defines as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." *Id.* § 153(43). Because that telecommunications is sold to the public for a fee as part of the sale of cable modem service, the cable modem service constitutes a telecommunications service under the plain language of the Act. A fast, "always on" transmission medium is a paradigmatic telecommunications service.

On the other hand, the service does not fit neatly into the definition of "information service." Information services are not used to transmit information of the user's choice. They are used to obtain information stored on the provider's network, or to manipulate data in some way. The legal research company Lexis-Nexis, for example, provides an information service, a service that offers "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." *Id.* § 153(20). Its services cannot be used to transmit information of the user's choosing unrelated to the data stored on Lexis-Nexis computers.

The FCC does not deny that this most straightforward reading of the statutory definitions (adopted by the Ninth Circuit here) is reasonable. It contends, however, that its contrary construction of the definition is also reasonable, and so is entitled to *Chevron* deference. In its construction, "the

Act's 'information service' and 'telecommunications service' definitions establish mutually exclusive categories of service." *Declaratory Ruling* ¶ 41, Pet. App. 97a. If there are information service functions provided along with telecommunications, the Commission therefore must find a "single, integrated information service." *Id.* As the government puts it here, a telecommunications service exists only when there is a "simple, transparent transmission path without the capability of providing enhanced functionality." U.S. Br. at 22 (quoting *Universal Service Report* ¶ 39). Because cable modem service includes some information service components, in the FCC's view it is exclusively and entirely an information service. *See Declaratory Ruling* ¶ 38, Pet. App. 93a-95a.

Petitioners principally offer a negative defense of the agency's construction, asserting that "[n]othing in the Communications Act required the Commission to break down that single service into conceptually distinct components for regulatory purposes and analyze each to determine its proper legal classification." U.S. Br. at 25-26. They observe that when a statute is ambiguous the agency has "the discretion to consider the various policies involved and construe the statute in the manner best calculated to achieve them." *Id.* at 28.

But "[a]mbiguity is a creature not of definitional possibilities but of statutory context," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), and as we show in what follows, the statutory context negates the FCC's construction here.

II. The FCC's Interpretation Is Inconsistent With the Statutory Framework

A. The FCC's Construction Does Not Implement the Statutory Distinction Between Telecommunications Service And Information Service

The FCC's construction of the definitions undermines the provisions of the Act within which the definitions operate. Specifically, Congress created an elaborate statutory framework for the regulation of transmission of information, but not for storage and manipulation of that information. In three related respects the FCC's interpretation of the statute is not faithful to this legislative framework.

First, the *Declaratory Ruling* undermines Congress' fundamental decision to regulate transmission networks. Congress regulated transmission services because of the network effects of transmission, because transmission networks often have bottleneck characteristics, and because of the overall importance of communications to the economy.[11] That much is apparent from the specific requirements Congress imposed on telecommunications services: provisions requiring interconnection, unbundling (in some circumstances), universal service payments, and access for customers with disabilities. 47 U.S.C. §§ 251, 254, 255.

[11] *See Scripps-Howard Radio v. FCC*, 316 U.S. 4, 14 (1942) (purpose of Act is to protect public interest in communications); *Orloff v. FCC*, 352 F.3d 415, 418 (D.C. Cir. 2003) (purpose of Act is to eliminate discrimination in rates); *In re Application of GTE Corp.*, 15 F.C.C.R. 14032, ¶ 67 (200 0) (purpose of Act is to eliminate bottlenecks and promote competition).

Each of the reasons Congress chose to regulate transmission facilities fully applies to mixed services. For example, the importance of Congress's requirement that telecommunications carriers interconnect their facilities with other carriers is the same whether or not the carriers bundle their telecommunications services with information services. If a carrier owns a bottleneck network facility that the public interest requires be shared, that interest is not changed one jot when the carrier also provides an information service over that bottleneck transmission facility. The FCC's decision to remove "mixed" services from Title II thus is not faithful to Congress' purpose in regulating telecommunications services in the first instance.[12]

Second, the government nevertheless asserts that there may be policy reasons to refrain from subjecting service provided over cable facilities, or over broadband facilities, to Title II regulation. U.S. Br. at 29-31. But these policies are not derived from the Act. Congress drew no regulatory distinction between cable or telephone transmission, or broadband and narrowband transmission. Accordingly, the FCC has previously concluded that cable telephony *is* a telecommunications service that falls within the ambit of Title II. *See, e.g., In re New Part 4 of the Commission's Rules Concerning Disruptions to Communications*, 19 F.C.C.R. 16,830, ¶ 115 n.335 (2004). It has likewise concluded that stand-alone broadband services

[12] For example, petitioners' assertion that its construction advances the policy goals of universal service, U.S. Br. at 26, is contradicted by its assertion, four pages later, that it adopted the construction in part to assure that cable operators would not "be required to contribute to federal universal service support mechanisms." *Id.* at 30. The *Declaratory Ruling* advances the goal of universal service only in the perverse sense that the FCC apparently believes that Congress' universal service requirements are unwise.

are subject to Title II.[13] And it has acknowledged in the very *Declaratory Ruling* under review that a cable provider that offered stand-alone broadband service would probably be providing a regulated telecommunications service. U.S. Br. at 24 (citing *Declaratory Ruling* ¶¶ 40-41, Pet. App. 97a).

Indeed, the distinction upon which the Commission relies between cable and telephone transmission media is expressly *proscribed* by the Act. The Act requires instead that transmission services be considered "telecommunications services" "regardless of the facilities used." 47 U.S.C. §153(46). The FCC therefore is not permitted under the Act to decide that the telecommunications component of telephone Internet access service is subject to Title II, but the same service offered over cable facilities is not. Yet that is precisely what it has done

[13] *Broadband Framework NPRM* ¶ 26 & n.60 (citing *Advanced Services Declaratory Ruling* ¶ 35); *see also In re Federal-State Joint Board on Universal Service, Report to Congress*, 13 F.C.C.R. 11,501, ¶ 15 (1998) ("*Universal Service Report*") ("[T]he provision of transmission capacity to Internet access providers and Internet backbone providers is appropriately viewed as 'telecommunications service' or 'telecommunications . . . .'"); *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 Communications Reg. (P&F) 407, ¶ 21 (1999) ("*Second 706 Report*") ("[B]ulk DSL services sold to Internet Service Providers are . . . telecommunications services, and as such, [I]LECs must continue to comply with their basic common carrier obligations with respect to these services."), *aff'd in part, vacated in part and remanded, GTE Servs. Corp. v. FCC*, 204 F.3d 416 (D.C. Cir. 2000); *Advanced Services Declaratory Ruling* ¶ 35 ("xDSL and packet switching are simply transmission technologies"); *In re GTE Telephone Operating Cos. GTOC Tariff No. 1*, 13 F.C.C.R. 22,466, ¶ 16 (1998) ("*GTE DSL Tariff Declaratory Ruling*"); *see also, e.g.*, Brief in Support, *In re Joint Application by SBC Communications Inc. et al., for Provision of In-Region InterLATA Services in Arkansas and Missouri*, CC Docket No. 01-194, at 54-58 (FCC filed Aug. 20, 2001) (DSL transport service is a telecommunications service).

here through the construction of the definitions and its assertedly discretionary decision to apply the *Computer Inquiry* rules to one transmission medium and not to another.

Third, even if the FCC had the authority to distinguish in this way between cable and telephone, or between broadband and narrowband, the FCC's rule is not tailored to accomplish that goal. Both telephone and cable transmission services are equally capable of being bundled with information services, and both narrowband and broadband transmission services also are equally capable of being bundled with information services. Consequently, the FCC's rule does not promote deregulation of cable or broadband any more or less than it promotes deregulation of telephone and narrowband. There is no fit at all between Petitioners' asserted policy goals and the regulation at issue here.[14]

In each of these ways, the FCC's regulation is at cross purposes with the Act which it is supposed to implement.

[14] In fact, the FCC's *Declaratory Ruling* does not advance a policy of deregulation in the first instance. To the contrary, the FCC remained agnostic about the need for regulation of cable modem service, putting the question out for notice and comment. As the United States is forced to acknowledge, "the Commission is evaluating in a pending proceeding what federal regulatory obligations, if any, it should impose on cable modem service providers under its regulatory authority." Brief 32. Since it is the FCC's position that under its preferred definition it can and may impose the full panoply of Title II regulation on the cable operators under its Title I authority, and that it could have avoided all regulation under its Title II forbearance authority if it had construed the definitions differently, it cannot rationally maintain that its construction of the definitions was in furtherance of a policy of leaving the Internet "unfettered by Federal and State regulation." Brief at 29 (quoting 47 U.S.C. § 230(b)(2)).

B. The FCC's Construction Unlawfully Negates Title II of the Communications Act

Worse still, as a practical matter, the FCC's rule would negate Title II altogether.

Any carrier subject to Title II may easily add an information service to its telecommunications service offering. Just as Internet access providers here offer the ability to create web pages, regular telephone providers can easily add an "integrated" voice mail service, or a weather report, to plain old telephone service. If that is all it takes to convert a "telecommunications service" into an "information service," the former category has effectively been negated. That is no doubt why the Bell Telephone Companies are vigorously supporting this FCC rule that ostensibly is protecting their competitors from regulatory responsibilities that apply to them. They understand that the inevitable consequence of this ruling is the elimination of Title II for them as well as for the cable companies.

There is no such thing as a "simple, transparent transmission path without the capability of providing enhanced functionality," U.S. Br. at 22 (quoting *Universal Service Report* ¶¶ 43, 59), except perhaps a string held taught between two Dixie cups. Ordinary phone service, for example, requires computer functionality in switches to route the calls. It includes computer look-ups to bill the calls. It relies on "signaling," which consists of data to indicate that the caller has picked up the phone and is now able to dial, to route the call, to disconnect the call, or to rapidly determine whether a particular transmission route is busy, for example. In the same way, routing of Internet traffic requires use of a technology called "DNS" to direct messages to their proper destination. Yet the FCC said that use of DNS was one reason that cable modem service is an information service.

Declaratory Ruling ¶¶ 37-38, Pet. App. 93a-94a. If that is so, then the provision of ordinary phone service is also an information service exempt from Title II. In fact, neither the signaling functions in an ordinary phone call, nor the DNS functions in cable modem service, make the service an information service. The statute explicitly exempts from the definition of information service capabilities used "for the management, control, or operation of a telecommunications system or . . . service." 47 U.S.C. § 153(20).

Even aside from features intrinsic to every phone call, if the FCC prevails, there will be no stand-alone transmission services left to regulate. Here ISPs "complement[]" their Internet access services with services such as e-mail. *Declaratory Ruling* ¶ 18, Pet. App. 68a. Wireline carriers will do the same, offering bundled services that include an information service component, and so escape the burden of Title II regulation. For example, voice mail is an information service. *In re Schools and Libraries Universal Support Mechanism*, 18 F.C.C.R. 9202, ¶¶ 28 nn.44 & 49, 29 (2003). Provision of information such as time, weather or sports scores also is an information service.[15] Under the interpretation provided by the FCC, a carrier selling basic phone service over either traditional telecommunications facilities or cable facilities could "incorporat[e] the active information-processing capabilities" of voice mail as a component of a bundled service provided for a set fee, U.S. Br. at 22 (quotation omitted), or could add an announcement of the time of day at the beginning of each call, and the combined service would be considered a single information service exempt from the statutory requirements of Title II. Similarly, a local exchange carrier providing broadband

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[15] FCC News Release, *Common Carrier Scorecard Report Released On-Line*, 1997 FCC LEXIS 7170 (Dec. 24, 1997) ("Examples of information services include medical, stock market, sports and product information.").

Internet access services could turn it into an information service by including a home page as part of its service (as they typically do, and as the cable companies have done here).

Nor can Petitioners claim that the announced rule is more limited and will apply in some principled way to some "mixed" services and not to others. The government says that "it would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status," and instead asserts that the service offered is a single "Internet access service." U.S. Br. at 20. But the FCC offers no means to distinguish between those services that "should be deemed" to be a single service, and those that "should be deemed" to include multiple services with separate legal status.

Instead, the *Declaratory Ruling* holds that *all* mixed services are information services. It maintains that the critical factor is the intention of the provider: if it *wishes* to offer a set of services together, at a single price, the offering is a single information service offering. *See, e.g.*, *Declaratory Ruling* ¶ 38, Pet. App. 94a-95a (The classification "turns on the nature of the functions that the end user is offered . . . . As currently provisioned, cable modem service . . . is an information service."). The implication of that rationale is that there can be no such thing as a bundled service that is not "integrated." This is a sweeping rule, and easy to apply. But it leaves the decision whether to regulate a service entirely within the hands of the regulated party, and in that situation a regulated party will always choose to "integrate" its service to avoid regulation. For that reason, the FCC and the courts have long held that status as a common carrier cannot be based on "the intentions of a service provider," *Computer II* ¶ 122. *Cf. Semon v.*

Royal Indem. Co., 279 F.2d 737, 740 (5th Cir. 1960) ("The common carrier's duty to serve all indifferently cannot be lessened by a violation of that duty.").

Petitioners sometimes imply a more limited characterization of the "integrated" nature of the service. They suggest that a cable modem service should be deemed an inseparable information service because the subscriber cannot use the service "*without* a corresponding change in the form or content of the information transmitted." U.S. Br. at 24; *see also id.* at 28 (suggesting that transmission "occurs *only* in connection with the further processing of the information"). The consumer assertedly always accesses the cable modem providers home page, for example. This is a post hoc rationalization that the FCC does not rely upon in its *Declaratory Ruling*. *SEC v. Chenery*, 318 U.S. 80 (1943). It is also factually inaccurate. The FCC acknowledges that a consumer can "click through" to the home page of an ISP other than the cable modem provider. *See Declaratory Ruling* ¶¶ 18 n.83, 25, 38, Pet. App. 69a, 78a, 95a (noting that customer can choose to use only the transmission part of the service).

Moreover, any such distinction (even if the FCC had relied upon it, and even if it had some factual basis) would be arbitrary. The cable modem provider's decision that, unless the consumer requests otherwise, the cable provider's home page will appear at the beginning of each session has nothing to do with the importance of regulating transmission. It is no different than a decision of a traditional telephony provider to add a time-of-day announcement at the beginning of every call, which also would mean the customer could not use the service without a "corresponding change in the content of the information."

Notably, the FCC's categorization of cable modem service is not based on the conclusion that information and telecommunications components are inherently intertwined and could not be separated. Indeed, the FCC acknowledged that cable companies might well offer pure transmission to ISPs. *Declaratory Ruling* ¶¶ 40, 46, 54, Pet. App. 97a, 102a-103a, 111a. The FCC based its ruling instead on the fact that cable modem providers had *chosen* to bundle information processing and telecommunications components together.

At other times, the government attempts to avoid the implications of the conclusion that all mixed services are purely information services by suggesting that cable modem service is different from other mixed services because cable modem providers do not offer any separate stand-alone transmission service. U.S. Br. at 24, 37-38; Cable Br. at 5. But that too is false. Many cable companies offer stand-alone voice telephony products. *Declaratory Ruling* ¶¶ 44, 46, Pet. App. 101a-103a. In any case, the reason cable providers did not previously offer any stand-alone transmission services is that they did not previously offer any transmission services at all, but rather a one-way television product, which explains why they were not historically regulated as telecommunications carriers. *Declaratory Ruling* ¶¶ 61-62, Pet. App. 120a-122a.

Nor can the FCC properly rely on the assertion that cable operators "have never been viewed as common carriers," U.S. Br. at 36, as a basis for its ruling here. If the FCC is suggesting that it is under no obligation to acknowledge "new" common carriers even if they otherwise meet the statutory criteria, that once again is inconsistent with the Act. Application of Title II turns on whether the service is a transmission service, not whether it is offered by a "traditional" common carrier.

Finally, each of these proposals suffers from the same defect: no matter how supposedly "integrated" or "novel" the service is, it indisputably contains a transmission component, and all of Congress's reasons for imposing common carrier regulation on transmission services apply equally to that transmission component, regardless of the degree of its "integration" with an information service, and regardless of its vintage. None of the shifting rationales offered in the *Declaratory Ruling* and the briefs addresses these fatal defects.

C. The FCC's Construction of the Act Unlawfully Gives It Absolute Discretion To Apply or Negate Title II

This is not to suggest that the Commission has no authority to promote deregulatory policies. It does. Congress expressly gave it that authority in the 1996 Act's "forbearance" provision. 47 U.S.C. § 160. Here, however, the FCC has not relied on its statutory forbearance authority, and has not attempted to apply the statute's criteria for forbearance. *See Declaratory Ruling* ¶ 95, Pet. App. 152a (requesting comment on "tentative conclusion" that forbearance would be appropriate). Instead, it has accomplished its deregulation through construction of statutory definitions and invocation of its *Computer Inquiry* rules. But "[courts] (and the FCC) are bound, not only by the ultimate purposes Congress has selected, but by the means it has deemed appropriate, and prescribed, for the pursuit of these purposes." *MCI Telecomms. Corp. v. Am. Tel. & Tel.*, 512 U.S. 218, 231 n.4 (1994). An agency "may not exercise its authority 'in a manner that is inconsistent with the administrative structure that Congress enacted into law.'" *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (quoting *ETSI Pipeline Project v. Missouri*, 484

U.S. 495, 517 (1988)). That is precisely what the FCC has done here.

This case is on all fours with *MCI v. AT&T*. There, too, the FCC determined that given the increasingly competitive nature of the telephone industry, and in furtherance of Congress's policy of deregulation, it made sense to construe a statutory term such that the practical effect was to eliminate a requirement in the Communications Act it viewed as anachronistic—in that case a requirement that tariffed rates be filed. But this Court rejected the FCC's statutory construction, since among other reasons, Congress in other parts of the Act had limited the FCC's ability to lengthen the notice period for tariffed rate changes. That limitation would make no sense, this Court concluded, if the FCC could simply do away with the rate-filing requirement altogether. 512 U.S. at 228-29. Here, too, Congress imposed strict statutory "forbearance" criteria on the FCC before it could eliminate Title II regulation of the owners of transmission networks. 47 U.S.C. § 160. It makes no sense that Congress would have intended that application of those requirements be completely discretionary. More generally, here, as in *MCI*, "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, []regulated to agency discretion." 512 U.S. at 231. The holding of *MCI* is that a construction of a statutory term whose sole virtue is that it renders application of the statute's operating provisions optional is not a rational construction of that term. That holding fully applies here.

The FCC's invocation of its *Computer Inquiry* rules, *Declaratory Ruling* ¶¶ 43-45, Pet. App. 100a-102a, merely underscores its error here. Those rules implement the FCC's decision to leave information services unregulated. They give the FCC no discretion to deregulate telecommunications

services. The decision to regulate those services was one that Congress made in Title II of the Act. The FCC thus has discretion to implement or change a rule to assure that the unregulated provision of information services does not inadvertently get caught up in the regulation of telecommunications services. It has no discretion to implement a rule to deregulate telecommunications services when they are bundled with information services, which is what it purports to do here.

D. Concluding That Cable Modem Service Includes a Telecommunications Service Would Not Lead to Regulation of All Information Services

As we have demonstrated, the critical defect with the FCC's interpretation is that it undermines the statutory framework by permitting telecommunications carriers to ensure their services are unregulated through the inclusion of an information service component in all service offerings. The cable companies contend that the opposite problem will beset an interpretation under which mixed services are considered, even in part, telecommunications services. They argue that under such an interpretation all information services would be considered telecommunications services and thus all would be regulated, contrary to Congress's intent to leave such services unregulated. Cable Br. at 30. That is incorrect.

To begin, most information service providers do not offer independent transmission capabilities to their customers. Information service providers that provide only the capability to store and manipulate data—such as Lexis or Westlaw, for example, or web page creators—are not providing independent telecommunications capabilities to their customers as part of their service. They are providing

information services "via telecommunications." These services are not telecommunications services subject to Title II under any conceivable definition of that term. They use telecommunications (which are provided by others) exclusively to deliver information they have stored or manipulated.

Even for companies that do offer mixed services (such as independent ISPs), the statutory mandate is that the telecommunications component must be regulated. Although nothing in the Act prohibits regulation of information services, the FCC could readily subject *only* the telecommunications component of the service to regulation either through appropriate tailoring of the regulations, or through application of the *Computer Inquiry* rules. And regardless of what the FCC did, the companies could voluntarily offer the "raw" telecommunications service components of their services so that only that service would be subject to regulation. Thus, with cable modem service, the provision of a home page or the ability to create a personal web page, would not be regulated, for example.

III. The FCC's Interpretation Represents a Radical And Unexplained Departure From Commission Precedent

The United States asserts that the *Declaratory Ruling* is grounded in past Commission precedent. In fact it is a radical departure from all previous Commission rulings on the topic.

Petitioners rely on the FCC's *Universal Service Report*, in which the FCC held that an enhanced service provider that makes use of another telecommunications carrier's transmission facilities is not itself providing a "telecommunications service." U.S. Br. at 21-25;

Declaratory Ruling ¶¶ 40-41, Pet. App. 97a-98a. The United States fails to acknowledge that in that very order the FCC went on to address the precise situation present here—in which an enhanced service provider makes use of its *own* transmission facilities. In that situation, the Commission concluded that the enhanced service provider is at once an enhanced service provider and at the same time a telecommunications service provider, subject to the Title II common carrier obligations. "[I]n every case, *some* entity must provide telecommunications to the information service provider. *When the information service provider owns the underlying facilities, it appears that it should itself be treated as providing the underlying telecommunications.*"[16] Thus, that portion of the FCC's decision upon which petitioners rely applied only to enhanced services providers using other carriers' facilities. It simply prevents *double* application of Title II requirements—both to the company from which the ISP obtained telecommunications and to the ISP itself. It did not allow transmission networks to go unregulated altogether.

A. Pre-1996 Act Precedent

In so ruling, the Commission was not breaking new ground. The treatment of facilities-based carriers that the FCC here abandons is as old as the Communications Act.

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[16] *Universal Service Report* ¶ 69 n.138 (emphasis added); *see also In re Implementation of the Non-Accounting Safeguards of Section 271 & 272 of the Communications Act of 1934, As Amended*, 16 F.C.C.R. 9751, ¶ 38 (2001) ("*Non-Accounting Safeguards Remand Order*") ("In fact, the *[Universal Service] Report to Congress* recognized that in cases in which an information service provider owns the underlying transmission facilities, and engages in data transport over those facilities in order to provide an information service, one could argue that the information service provider is 'providing' telecommunications to itself by furnishing raw transmission capacity for its own use.").

Building on the history of common carriage regulation, Congress in 1934 imposed a series of duties on providers of transmission services. *See supra* p. 2. Although the nature of those duties has changed over time, the Act (and, until this *Declaratory Ruling*, the FCC's regulations implementing the Act) consistently has imposed these duties on the owners of transmission networks.

In 1934, there was no concern with "information services," and the 1934 requirements applied to all transmission services made generally available to the public.

As computer processing applications developed in the 1970s, and data from those applications were transmitted over transmission facilities, the FCC considered whether common carrier regulation applied to these new services. As the cable companies explain, the FCC decided not to regulate these new services based on a "reluctan[ce] to regulate competitive parts of the economy only indirectly related to its communications mandate." Cable Br. at 26. But as the cable companies further acknowledge, this reluctance was coupled with a concern that telephone companies would violate their statutory obligations and "deny computer-service rivals essential telephone inputs." *Id.* For that reason, the FCC required continued regulation of transmission facilities. *See supra* pp. 2-4.

It would have been inconsistent with the Act's pre-1996 regulation of common carriage for the FCC to have concluded that transmission became exempt from statutory requirements when combined with a computer processing application. For while the FCC was entitled to conclude that the new computer services fell outside the regulatory framework, it was not entitled to rely upon this principle as a pretext for undermining Congress's requirements concerning transmission. As the Commission has long made clear,

"since the *Computer II* regime, we have consistently held that the addition of . . . enhancements . . . to a basic service neither changes the nature of the underlying basic service when offered by a common carrier nor alters the carrier's tariffing obligations." *In re Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, ¶ 274 (1988).

Until this decision the FCC never even considered this issue to be open to question. Thus, in the *Frame Relay Order* ¶ 52, the Commission determined that AT&T's frame relay service, a high-speed data service similar to a broadband service, was a basic telecommunications service. In reaching that conclusion, the Commission responded to the argument that the particular frame relay service in question had an enhanced service component (protocol processing) and that this enhanced service component "contaminated" the basic frame relay service such that there was no longer any basic transmission service that needed to be made available to competitors—[illegible] very claim the FCC makes in the *Declaratory Ruling* under review here.[17]

In the *Frame Relay Order*, the Commission rejected this claim out of hand, concluding that it was "obviously an undesirable and unintended result." *Id.* ¶ 44. The Commission made clear that the contamination theory did *not* apply to carriers such as AT&T that owned their own facilities. Were it otherwise, the Commission concluded, any carrier could escape the statutory requirements applicable to

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[17] The Commission had previously applied the contamination theory to hold that value-added networks that *resold* transmission but added an enhanced service component provided enhanced services, not basic services. *Frame Relay Order* ¶ 5. In those cases, the carrier from which the value-added networks purchased transmission was already subject to regulation, rendering additional regulation of the transmission unnecessary.

its transmission facilities by combining them with an enhanced service. *Id.*

B. Post-1996 Act Precedent

In adopting the 1996 Act, Congress did not evidence any intent to eliminate this regulatory paradigm. Nothing in the words that Congress chose could plausibly be read to work the radical constriction of common carrier principles that would result from the conclusion that a service such as cable modem service *stops* being a "telecommunication service" merely because a company bundles the service with an information service. To the contrary, as we have seen, the language and statutory structure establish the contrary. Nor does the legislative history even hint at such a revolutionary purpose.[18] Indeed, the Commission previously has acknowledged that "Congress intended the definitions of 'telecommunications,' 'telecommunications service' and 'information service' to build upon the frameworks

[18] The only relevant legislative history is the Senate Report describing the version of the bill that adopted the "telecommunications service" and "information service" distinction. Petitioners acknowledge that this legislative history makes clear that Congress intended the Ninth Circuit's construction and rejected the construction adopted by the FCC. U.S. Br. at 27. Petitioners claim weakly that the legislative history nevertheless should be ignored because the precise language of the definitions was altered in minor respects in the Act as passed. But the adopted language is not materially different from the language in the Senate Bill. As the government notes, the Senate version of the 1996 Act stated that telecommunications service included "the transmission, without change in the form or content, of information services and cable services," but not, "the offering of those [information or cable] services." U.S. Br. at 27 (quoting S. Rep. No. 104-23, at 79 (1995)). The change to the final version was a minor one that simply made the definition's characterization more accurate. Since it is information, not information or cable services, that is actually transmitted, Congress removed the word "services."

established prior to the passage of the 1996 Act, including . . . Commission precedent."[19]

Accordingly, until the *Declaratory Ruling*, the Commission's post-1996 precedent was consistent with its earlier precedent. Indeed, the very example the Commission first used in reaffirming its longstanding view that the telecommunications component of a "mixed" service remains subject to Title II was broadband Internet access service:

> An end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately: the first service is a telecommunications service (e.g., the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access.

Advanced Services Declaratory Ruling ¶ 36.

The FCC reached the same conclusion in the *GTE DSL Tariff Declaratory Ruling*, concluding that "an otherwise interstate basic service . . . does not lose its character as such simply because it is being used as a component in the provision on a[n enhanced] service that is not subject to Title II." *GTE DSL Tariff Declaratory Ruling* ¶ 20 (quoting *ONA Plans Declaratory Ruling*, 4 F.C.C.R. 1, ¶ 274 n.617 (1988)).

[19] *Non-Accounting Safeguards Remand Order* ¶ 29; *see also Universal Service Report* ¶ 45 ("Congress intended the 1996 Act to maintain the Computer II framework."); *id.* ¶ 39 ("[I]n defining 'telecommunications' and 'information services,' Congress built upon . . . *Computer II*.").

More recently, the Commission directly considered the regulatory status of "bundled" broadband Internet access service. Far from holding that information services are "integrated" or "unified" services without an identifiable transmission component, in the *CPE/Enhanced Services Bundling Order* the Commission held precisely the opposite. It held that "all enhanced services are 'bundled' services" made up of a separately identifiable "telecommunications service and the computer processing that is necessary to offer the information-based portion of the service." *CPE/Enhanced Services Bundling Declaratory Ruling* ¶ 41. The Commission reiterated that "the separate availability of the transmission service is fundamental to ensuring that dominant carriers cannot discriminate against customers who do not purchase all the components of a bundle from the carriers themselves." *Id.* ¶ 44.

The Commission accordingly held that when an information service provider makes use of its own transmission facilities, those facilities constitute a distinct telecommunications service, and for that reason the information service provider must pay contributions to the FCC's universal service fund. And the United States' assertion to the contrary notwithstanding, the FCC grounded this understanding not exclusively on its *Computer Inquiry* rules, but on the core Title II requirements of "section 202 of the Act [that carriers] not discriminate in their provision of transmission service to competitive internet or other enhanced service providers." *Id.* ¶ 46.

Indeed, only a month before it concluded in the *Declaratory Ruling* that cable modem providers (a type of facilities-based ISP) are providing a "unified" information service without any distinct telecommunications service component, the Commission once again reiterated its longstanding view to the contrary, that owners of

transmission networks that "provide broadband transmission services or other telecommunications services to . . . affiliated . . . Internet service providers" must contribute to the universal service fund because they are providing a separate, identifiable, "telecommunications service." *Broadband Framework NPRM* ¶ 72. This is so, the Commission stressed, even when the provider is not required to separately offer the transmission service to the public for a fee, but instead offers "broadband Internet access to end-users for a single price," as part of a "bundled package" of telecommunications and information services, the exact situation present here. *Id.* (quotation omitted). Petitioners' assertion that these common carrier Title II rules apply only when a provider "made a 'stand-alone offering of transmission for a fee directly to the public,'" U.S. Br. at 24, quoting *Declaratory Ruling* ¶ 40, Pet. App. 97a, has never been the law.

To be sure, the FCC previously had drawn a distinction between regulated facilities-based providers of information services, and unregulated non-facilities-based providers. The government asserts that nothing in the Communications Act requires the Commission to maintain such a distinction. U.S. Br. at 24-26. That may well be so. As we demonstrated above, *supra* pp. 15-17, the statutory language is best read as requiring *all* providers of mixed services to be categorized in part as telecommunications service providers. But if the government is correct that the statute is ambiguous on this point, the language would still have to be interpreted consistently with the statutory framework. An interpretation under which mixed services provided over a carrier's own facilities are considered telecommunications services, but other services are not, meets this standard. In contrast, the FCC's new

interpretation, under which all mixed services are considered purely information services, does not.

C. The FCC Misconstrues the *Computer Inquiry* Rules

Finally, petitioners assert that the evident inconsistencies between the *Declaratory Order* and earlier decisions are the consequence of the fact that it has declined to apply the *Computer Inquiry* rules to cable operators, a choice it claims it is free to make. But as we just demonstrated, the Commission's previous refusal to allow the owners of transmission networks to shield themselves from regulation by adding an information service to their product was based on Title II itself, and not exclusively on the *Computer Inquiry* rules. *See supra* pp. 36-37.

Petitioners' arguments to the contrary not only ignore past Commission precedent, they also are based on a misunderstanding of the source and reach of the FCC's regulatory authority. The requirement that transmission networks be regulated under Title II as common carriage is not a product of the *Computer Inquiry* rules. That requirement instead is a necessary consequence of Title II itself, and its application was never a matter of Commission discretion.[20] The *Computer Inquiry* rules addressed the *de*regulation of enhanced services, a matter that *is* within the Commission's discretion. To the extent the rules create a dividing line between basic and enhanced services, the line allows the Commission to carry out its deregulation of the information service features of bundled information services. It does not give the Commission authority it never had to

[20] *See, e.g., Computer II*, ¶ 7 ("The common carrier offering of basic transmission services are communications services and regulated as such under traditional Title II concepts.").

deregulate basic telecommunications services. *See supra* pp. 28-29.

CONCLUSION

For the foregoing reasons, the decision of the Ninth Circuit should be affirmed.

Respectfully submitted,

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, et al.,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, et al.,

Respondents.

On Writs Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Whether the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, classifies the high-speed transmission component of cable modem service as a telecommunications service within the meaning of § 153(46).

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents States and Consumer Groups state the following:

The California Public Utilities Commission, the Vermont Public Service Board, and the Vermont Department of Public Service are governmental entities.

The Consumer Federation of America and Consumers Union (Consumer Groups) do not issue shares to the public and have no parent corporations that issue shares to the public. The Consumer Federation of America is the nation's largest consumer advocacy group, composed of two hundred and eighty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

Consumers Union, publisher of *Consumer Reports*, is an independent, nonprofit testing and information organization serving only consumers.

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STATEMENT

This case is not about regulating the Internet. It is about classifying the connection that enables residential customers to get on to the Internet, and how Congress sought to expand access to that connection by both consumers and competitors alike. When customers connect to the Internet by dial-up telephone service, that connection (or pipeline) is classified as a telecommunications service under the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("Act" or "1996 Act").[1] When customers access the Internet by a high-speed telephone line, known as digital subscriber line service ("DSL"), that pipeline has historically been classified under the Act as a telecommunications service. This case presents the question of whether Congress intended to classify the pipeline that connects customers to the Internet via high-speed cable lines as a telecommunications service. The answer is plainly yes.

a. Connecting to the Internet. Connecting to the Internet is becoming of critical importance in the way Americans live, learn, and work. With high-speed or broadband connections, high school students in rural areas can view museum collections in a distant city, health care clinics can transmit a patient's X-rays for expert evaluation hundreds of miles away, and a working mother can

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[1] All statutory references are to the Communications Act of 1934, as amended, 47 U.S.C. §§ 151 *et seq*. Relevant provisions are set forth in the attached Statutory Appendix. "Pet. App." refers to the FCC's Appendix accompanying its petition for writ of certiorari. "FCC Br." refers to the Brief for the Federal Petitioners. "Cable Ind. Br." refers to the Brief For Cable-Industry Petitioners.

conduct her international accountancy business from home. And because high-speed connections enable video conferencing, the Internet has become a critical communications tool for the hearing-impaired. None of this is possible with slow-speed, dial-up connections to the Internet. Pet. App. 42a n.2.

Yet to participate fully in modern life, consumers must not only have a means of accessing the Internet, but that access must be affordable. Today, the cost of connecting to the Internet is the main barrier to connectivity. According to recent data compiled by the United States Department of Commerce, those who live in rural communities, those who have low incomes, and those who are disabled are far less likely to have high-speed access to the Internet in their homes.[2] A "digital divide" exists.

To bridge this divide, Congress expanded the historic goal of universal service, and declared as an important principle in the Telecommunications Act of 1996 that "access to advanced telecommunications and information services should be provided in all regions of the Nation." 47 U.S.C. § 254(b)(2). Congress specifically instructed the FCC as well as the states to use their "regulating methods" over "telecommunications services" to ensure that all Americans have the high-speed "advanced telecommunications capability" that connects them to the "data, graphics and video telecommunications" available on the Internet. § 706(a) (reproduced at note to 47 U.S.C. § 157).

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[2] U.S. Department of Commerce, Economics and Statistics Administration, National Telecommunications Administration, *A Nation Online: Entering the Broadband Age* (Sept. 2004), Appendix Table 1. http://www.ntia.doc.gov/reports/anol/NationOnlineBroadband04.pdf.

One of the high-speed means by which consumers can connect to the Internet is cable modem service. The FCC defines cable modem service as having two separate components: a transmission component which connects customers via high-speed cable lines to the Internet, and an information component, which consists of services such as e-mail, a personal web page, or database services like LEXIS. Pet. App. 86a, 94a.

The Internet itself is simply a collection of interconnected computers dispersed throughout the world that form an international transmission network. *Reno v. ACLU*, 521 U.S. 844, 849-50 (1997). Internet service providers ("ISPs"), as the name suggests, provide access to that network to consumers. Once on the Internet, consumers can search for and retrieve information stored in remote computers, utilize electronic mail, and access news groups. *Id.* at 851-52. Some ISPs offer consumers additional services, such as an e-mail account, a personal web page, or access to their own extensive proprietary networks. *Id.* at 850; Pet. App. 68a.

Consumers, in turn, need to have some way of contacting, or connecting to, the ISPs. Initially, ISPs were standalone enterprises, and customers accessed them via their ordinary dial-up telephone service provided by the telephone company. Ordinary dial-up telephone service that connects end-use customers to the ISP is significantly slower than the relatively high-speed (broadband) transmission network that connects all computers that comprise the Internet, and as a result, creates a speed bottleneck. As technologies developed, telephone companies introduced a new, faster transmission service, known as DSL service, to allow customers to connect to ISPs at speeds many times faster than ordinary dial-up service. With the advent of DSL service, some telephone companies

created their own ISPs, and bundled sales of their DSL transmission service with their ISP services. Later still, cable television operators entered the residential high-speed transmission market, creating their own ISPs and using their cable lines, which are functionally similar to DSL service, to allow customers to have a relatively fast connection to ISP services.

Today, the "last-mile" high-speed link that connects residential customers to the ISP is principally controlled either by the telephone company via DSL service, or by the cable company via cable modem service. Nationwide, cable modem service comprises about 68 percent of the residential broadband market. Pet. App. 51a. Other high-speed networks, such as wireless, are not yet widely available to residential customers. FCC Pet. for Writ of Cert. 5. In many areas, customers have access to DSL service or cable modem service, but not to both. In California, for example, only one in four customers who have access to high-speed transmission service has a choice between DSL service and cable modem service to connect to the Internet.[3] In Vermont, nearly half of the population with access to broadband service has only one choice – either DSL or cable modem service.[4] Where cable modem service is the only high-speed option, the cable operator may charge residential customers whatever it wants for connecting to the Internet.

[3] California Public Utilities Commission, *The Status of Telecommunications Competition in California*, Second Report for the Year 2002, at 32, http://www.cpuc.ca.gov/word_pdf/REPORT/25310.pdf (Feb. 28, 2003).

[4] Vermont Department of Public Service, *Vermont Telecommunications Plan*, September 2004, at 3-10, http://www.state.vt.us/psd/Menu/Telecomm/telplan4/FinalPlan.pdf.

b. The 1996 Act. Congress enacted the 1996 Act "to open all telecommunications markets to competition," Preamble, 110 Stat. 56, including those served by ISPs, so that all Americans could have access to a wide variety of services at lower prices from numerous providers. To preserve the affordability of telecommunications services, Congress codified the requirement that all providers of telecommunications services contribute to the funding mechanisms that support universal service. § 254(d). Congress also defined several new terms to help achieve the Act's goals. Under § 153(43), "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." In § 153(46), a "telecommunications service" is the "offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public," "regardless of the facilities used." "Information services" are defined under § 153(20) of the Act in pertinent part as services that offer the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." In § 153(44), "'a telecommunications carrier' means any provider of telecommunications services" but such carrier "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."

The Act's distinction between "telecommunications services" and "information services" derives from the distinction between "basic services" and "enhanced services" under what is known as the FCC's "Computer II"

regulatory framework,[5] and later incorporated into the Modification of Final Judgment which settled the break-up of AT&T. *See In re Federal-State Joint Bd. on Universal Serv., Report to Congress*, 13 F.C.C.R. 11,501, 11,511, ¶ 21 (1998) (*"Universal Service Report"*) ("Reading the statute closely, with attention to the legislative history, we conclude that Congress intended these new terms to build upon the frameworks established prior to the passage of the 1996 Act"). Under the Computer II framework, the FCC distinguished between "basic" transmission services, a class of services subject to common carrier regulation under Title II of the Act, and "enhanced" or "information" services, a class of services not subject to Title II, that are provided over basic transmission services. *In re Amend. of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d at 420. Sections 201 and 202 of Title II require those who offer common carrier services to provide them upon reasonable request, and on nondiscriminatory terms. Since Computer II, the FCC has consistently regulated a telecommunications carrier's basic transmission service as common carriage even when bundled for sale with information services. FCC Br. 35.

Computer II's regulatory framework spawned an explosive growth of new and innovative computer-based information services introduced by new competitive entrants into the information services market. *Universal Serv. Report*, 13 F.C.C.R. at 11,546, ¶ 95. Telephone companies in turn began to develop and perfect high-speed DSL transmission services to support the delivery to

[5] *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C. 2d 384, 417 (1980), *aff'd sub nom. Computer and Communications Industry Ass'n v. FCC*, 693 F.2d 198 (D.C. Cir. 1982).

customers of Internet-based information services offered by both the telephone companies and competitive ISPs. The ultimate beneficiaries of this regulatory framework have been consumers, with greater access to a wider choice of information services at lower prices.

During this time, cable television operators also expanded their service offerings, and began providing common carrier voice (telephone) service to end-use customers over the physical facilities used to deliver their TV service. Pet. App. 101a. In recognition of that fact, Congress provided in the Cable Policy Act of 1984, Pub. L. No. 98-549, 98 Stat. 2779 (1984), that to the extent that cable companies offered common carrier services, they would be treated as common carriers just like the telephone companies. § 541(d)(1) & (2). Congress made clear that services were to be distinguished on the basis of function, and not on the types of facilities used or technology deployed to provide them. H.R. Rep. No. 98-934, 1984 WL 37495, at 43 (Aug. 1, 1984).

Congress enacted the 1996 Act against this regulatory, judicial and legislative backdrop: It incorporated the distinction between basic transmission and information services (*see* §§ 153(46), 153(20)); it retained and built upon the framework that barred carriers from discriminating against their information service competitors in providing telecommunications services (*see, e.g.*, §§ 260(a)(2), 275(b)(1)); it maintained technological neutrality, distinguishing services based only upon function and not by the types of facilities or technology used (*see* §§ 153(46), 706(a)); and it sought to promote by "regulating methods," including "regulatory forbearance," affordable access by all Americans to the high-speed services necessary to connect to

advanced services available on the Internet (*see* §§ 254(b)(2), (3), (6), 706(a)).

c. *AT&T Corp. v. City of Portland.* Nearly five years ago, in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), the Ninth Circuit held that, under the 1996 Act, the high-speed cable line that comprises the telecommunications component of cable modem service is a telecommunications service as defined in § 153(46). The court said:

> Like other ISPs, [AT&T's cable broadband service] consists of two elements: a "pipeline" (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, [the cable broadband provider] controls all of the transmission facilities between its subscribers and the Internet. To the extent [a cable broadband provider] is a conventional ISP, its activities are that of an information service. However, to the extent that [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing telecommunications service as defined in the Communications Act.

Pet. App. 15a (brackets and parentheses in orig.).

In reaching this conclusion, the court considered the Act's technological neutrality, the FCC's classification of functionally similar DSL service as a telecommunications service, and the Act's purpose in promoting "vigorous competition" among providers that "prioritizes consumer choice" by mandating a network architecture embodied by the "dual duties of nondiscrimination and interconnection." *Portland*, 216 F.3d at 879. The court, however, did not require the FCC to regulate the telecommunications service component of cable modem service under Title II,

but properly concluded that this policy matter was for the FCC alone to decide pursuant to the agency's regulatory forbearance authority in § 160. *Id.* at 879-80.

No party sought review of *Portland*.

d. The FCC's Declaratory Ruling. Two years after *Portland*, in direct conflict with that decision, the FCC declared that cable modem service, when offered to the public for a fee, is solely an information service, and does not contain a telecommunications transmission service component within the meaning of § 153(46) subject to Title II and Computer II. Pet. App. 94a-96a. Ignoring the Act's requirement of technological neutrality, and relying on the historical happenstance of the way connecting to the Internet had evolved, the FCC observed that Computer II's obligations of nondiscriminatory access to company-controlled transmission services "have been applied exclusively to traditional wireline services and facilities," that the "*telephone network* is the primary, if not exclusive means" by which ISPs can access their customers, and that the FCC had "never . . . applied Computer II to information services provided over cable facilities." Pet. App. 100a-101a (emphasis in orig.). The FCC thus declared that only facilities-based (*i.e.*, those that own or control transmission facilities) *telephone* companies, but not facilities-based *cable* companies, must provide the Internet connection pipeline underlying their information services on a common carrier basis. Pet. App. 101a-102a.

The FCC acknowledged that cable modem service does in fact contain a functionally discrete telecommunications transmission component that, if offered on a stand-alone basis, would qualify as a telecommunications service within the meaning of § 153(46). Pet. App. 97a. The FCC, however, contended that when a cable operator chooses to

bundle the transmission component with information services for sale to the public, the transmission component ceases to be a legally separate service. At the same time, the FCC admitted that the customer is not compelled to use the bundled services package, and could completely bypass the cable operator's ISP services by "clicking through" and separately utilizing the transmission path to reach another ISP. The FCC, however, acknowledged that, in such a case, the customer would be forced to pay an additional fee over and above the monthly charge for cable modem service, and thus pay twice for ISP-type services. Pet. App. 57a-58a.

Simultaneous with the issuance of its ruling, the FCC initiated a further proceeding in which, among other things, it is considering whether to forbear under § 160 from regulating the telecommunications service component of cable modem service in light of *Portland's* holding. Pet. App. 151a-152a. The FCC has yet to act. The FCC is also currently considering whether to reclassify DSL service as solely an information service. *See In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Notice of Proposed Rulemaking*, 17 F.C.C.R. 3019 (2002).

Commissioner Copps dissented from the Declaratory Ruling, stating that it was inconceivable "that Congress intended to remove from its statutory framework core communications services," such as cable broadband transmission service, or that Congress "envisioned its statutory handiwork being made obsolete by a new service offering." Pet. App. 199a. In particular, he criticized the FCC's refusal "with scant analysis" to apply its own rules in Computer II that "ha[ve] been key to the development of

a competitive information services market." Pet. App. 200a.

e. *Brand X Internet Servs. v. FCC*. In a per curiam opinion, the Ninth Circuit vacated the FCC's ruling that classified cable modem service as wholly an information service under the Act. After concluding that the "regulatory classification of broadband service [was] an essential element of our decision" in *Portland*, Pet. App. 16a, the court adhered to that decision, citing the law of its circuit and applying this Court's decision in *Neal v. United States*, 516 U.S. 284 (1996). Pet. App. 17a-21a. Judges O'Scannlain and Thomas each filed concurring opinions. Judge O'Scannlain expressed uneasiness that stare decisis bound the panel to its precedent, although he noted that an en banc panel could overrule the court's prior decisions. Pet. App. 23a. Judge Thomas, who authored the *Portland* decision, stated that "even if we were writing on a clean slate," he would have reached the same result. Pet. App. 39a.

The FCC and the cable association thereafter sought rehearing en banc before the Ninth Circuit. The court, however, chose not to revisit *Portland*, and declined to grant en banc review, with no active judge on the Ninth Circuit requesting a vote on whether to rehear the case en banc. Pet. App. 207a. These petitions for writs of certiorari followed.

SUMMARY OF ARGUMENT

Everyone agrees that if cable companies sold high-speed Internet pipelines to consumers as a stand-alone product – without including various information services, such as e-mail – such a product must be classified as a telecommunications service under § 153(46), subject to the

regulatory provisions of Title II of the Act. The "problem" in this case, according to the FCC, is that cable companies have chosen not to offer the high-speed Internet pipeline as a stand-alone product, but instead compel consumers to purchase the pipeline along with information services, like e-mail, as a "bundled service" that the FCC calls cable modem service. The FCC interprets the Act to conclude that the bundled service is solely an information service with no legally distinct telecommunications service component.

The FCC's classification of cable modem service as lacking a legally cognizable telecommunications service depends entirely on this "bundling" theory. The FCC contends that because the statute does not explicitly tell it how to classify such "bundled" services, the FCC is free to conclude – as it did in the Declaratory Ruling – that when the high-speed pipeline becomes part of a bundled package, the Internet connectivity component of cable modem service loses its legal character as a telecommunications service, and the FCC may thus permissibly classify the packaged offering as solely an information service. *See* FCC Br. 26. This interpretation exceeds the bounds of reason.

First, nothing in the plain text of the Act's definitions and their legislative history supports the FCC's view that bundling makes any difference at all to the legal status of high-speed Internet pipelines. Cable modem service is no more and no less than a telecommunications service (the Internet pipeline) packaged for sale with one or more information services. The Act does not permit the FCC to deem legally non-existent a telecommunications service just because a cable company forces consumers to buy it with some information service.

Second, to the extent that the statutory definitions, viewed in isolation, are not perfectly clear, they become so when viewed in the context of the Act's other provisions, its purposes, and its history. The FCC's bundling theory supporting its statutory interpretation cannot stand because it takes regulatory decisions out of the FCC's hands, and indeed, out of Congress' hands, and puts them solely into the hands of the cable companies' marketing departments. Indeed, because the FCC's bundling theory applies equally to cable modem service and to DSL service, and even to old-fashioned dial-up service, the FCC's interpretation, if adopted, would put all regulatory decisions about telecommunications services into the hands of corporations, not the FCC. Any company that offers telecommunications services – from voice telephone service to DSL service and so forth – could simply evade all regulation by selling that service bundled with some information service, such as voice mail.

Most significantly, the FCC's statutory interpretation thwarts the goal of universal service – nationwide, affordable telecommunications service – that is one of the central objectives of the 1996 Act. Through the Act, Congress sought to achieve universal service in two principal ways: (1) by maintaining nondiscriminatory access to telecommunications services to spur competition among numerous providers of services, leading to lower prices for consumers; and (2) by prescribing funding mechanisms to subsidize telecommunications service to those customers living in rural and underserved areas where competition is less likely to develop. The FCC's statutory interpretation, based on its bundling theory, ignores Congress' prescription to promote universal service by impermissibly exempting cable modem providers from the Act's provisions requiring nondiscriminatory access to telecommunications

services, and the subsidy of such services in rural and underserved areas.

To be sure, Congress recognized that competition sometimes works better than regulation; however, Congress balanced that presumption with provisions in the Act that permit the FCC to forbear from regulating certain services, provided that the FCC follows the carefully-prescribed procedures mandated by Congress in § 160. The FCC's interpretation of the statute bypasses this detailed, congressionally-mandated scheme, and says – in so many words – that the decision whether to be regulated is no longer Congress' or even the FCC's. That determination, based on the FCC's interpretation, now lies solely with every telecommunications company's marketing department, by the simple expedient of taking what everyone agrees is a telecommunications service, and marketing it together in a single package with an information service.

The Communications Act, read as a whole and in light of Congress' clear purposes, does not permit such a result. The FCC's interpretation of the statute is patently at odds with Congress' intent, and is unreasonable. Accordingly, the judgment below should be affirmed.

ARGUMENT

I. THE FCC FAILS TO RECOGNIZE THAT THIS CASE CONCERNS THE "PIPELINE" THAT CONNECTS CONSUMERS TO THEIR ISP, ALLOWING THEM ACCESS TO THE INTERNET

As an initial matter, it is important to clarify that at issue here is the last-mile connection, or pipeline, that connects a customer to an ISP, and whether that pipeline qualifies as a "telecommunications service" under § 153(46) of the Act. No one disputes that when the telephone

company offers a dial-up telephone pipeline to connect the customer to an ISP, the Act classifies that pipeline as a "telecommunications service." And historically, when the telephone company leases a high-speed (DSL) telephone pipeline to an ISP, which then connects the line to its customers, the FCC always has classified that pipeline as a "telecommunications service." Similarly, when the telephone company acts as its own ISP – that is, when it provides customers with information services like an e-mail account, a personal web page, and data retrieval – the FCC historically has classified the underlying DSL pipeline as a "telecommunications service," even though the pipeline is sold together with information services. *See In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,011, 24,030, ¶ 36 (1998) (an "end-user may utilize a telecommunications service together with an information service, as in the case of Internet access. In such a case, however, we treat the two services separately" under the Act) (citations omitted).

Critically, in each and every case, when someone wants to get onto the Internet, some entity must offer to the customer a pipeline that connects the customer's home to an ISP. In the case of dial-up or DSL service, that entity is the telephone company that controls this last-mile connection, and that pipeline is classified as a telecommunications service under the Act. At issue here is whether this same sort of pipeline – when offered to the public by a cable company – may be treated differently under the Act.

The sometimes confusing terminology that has been applied in the past can obscure this basic distinction between the last-mile Internet connection (the pipeline) and the information services that are "on" the Internet. Thus, for example, in its brief the FCC spills a lot of ink

trying to explain how the Act's definition of "information service" pertains to the classification of the "Internet access services" offered by ISPs described in its Universal Service Report to Congress, and why that discussion supports the FCC's interpretation of the Act. *See, e.g.*, FCC Br. 6-7. But the Internet-based "access" services discussed there are those offered by "traditional" ISPs – *i.e.*, those that do not control the last-mile transmission pipeline to the customer. *Universal Serv. Report*, 13 F.C.C.R. at 11,540 ¶ 81; FCC Br. 7. As the FCC explained, in those cases, end-users must first obtain a "'telecommunications service' from local exchange carriers" – *e.g.*, a dial-up telephone service connection – and "then use information services provided by their Internet service provider" to access a site like Expedia. 13 F.C.C.R. at 11,572, ¶ 145. The FCC thus made clear that the services provided by the ISPs discussed in the report do not include this last-mile "telecommunications service" connection; the services they provide are concededly information services and are not at issue here. The service at issue here – the high-speed cable pipeline offered by cable operators to connect a customer to an ISP – is one that the FCC expressly declined to classify in that report. *Id.* at 11,535, n.140.

II. THE FCC'S INTERPRETATION OF THE STATUTE IS WHOLLY INCONSISTENT WITH THE STATUTE'S TERMS, HISTORY, AND PURPOSE

The question presented here is how, under the 1996 Act, Congress intended to classify the high-speed cable pipeline described above. The FCC insists that its interpretation of the statute deserves deference under *Chevron U.S.A. Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984). The FCC's interpretation, however, is entitled to *Chevron* deference

(a) only if the statute does not speak directly to the issue, and then (b) only if the FCC's interpretation is reasonable. *Id.* at 842-43. The FCC cannot clear either hurdle. As the Ninth Circuit concluded in *Portland*, the statute is clear.[6] But even if it were not, the statute is not susceptible to the FCC's interpretation.

A. The Act's Definitions Themselves Foreclose the FCC's Interpretation

The FCC's statutory analysis starts, and largely ends, with its parsing of three definitions. In § 153(20), Congress defined an "information service" as the "offering of a capability for . . . making available information via telecommunications." "Telecommunications" in turn is defined in § 153(43) as "the transmission . . . of information of the user's choosing," "between or among points specified by the user," "without change in the [information's] form or content." When "telecommunications" is "offer[ed] for a fee directly to the public or to such classes of users as to be effectively available directly to the public," it is a "telecommunications service" "regardless of the facilities used." § 153(46).

The FCC painstakingly strains to avoid classifying the telecommunications component of cable modem service as a telecommunications service by focusing on the fact that cable operators choose to sell a bundled package of services: high-speed internet connectivity (the pipeline) along with various Internet-based information services (such as

[6] The Ninth Circuit in the decision below thus properly adhered to its decision in *Portland* because *Portland* correctly construed the statute. Respondents, however, agree that this Court is not bound by that ruling.

e-mail, or a personal web page). On this basis, the FCC argues principally that because of this "bundling," the cable operator does not "offer" the high-speed cable pipeline as a "telecommunications service" within the meaning of § 153(46), because it does not provide it on a "stand-alone" basis, separate and apart from its offer of information services. Pet. App. 97a; *see also id.* 96a (cable operator does not "offer" the high-speed cable pipeline because it is "part and parcel" of its offer of information services). At the same time, the FCC contends, such bundled service fits nicely within the Act's definition of an information service in § 153(20), because that provision uses the words "telecommunications" and "information service" in the same definition. Thus, the FCC concludes, cable modem service is solely an information service under the Act.

Putting aside that the Act's definitions must be construed "in their context and with a view to their place in the overall statutory scheme," *see Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989), the Act's definitions and their legislative history, even when viewed in isolation, demonstrate that the FCC's interpretation is simply not reasonable.

a. Fundamentally, the Act does not support the FCC's view that cable modem service lacks a separate, legally cognizable telecommunications service component that must be classified as such under § 156(46). Nothing in the Act's definitions requires, or even suggests, that a high-speed cable pipeline must be offered or priced separately from information services to qualify as a "telecommunications service." Section 156(46) says only that when telecommunications capability is "offer[ed] for a fee directly to the public or to such classes of users as to be

effectively available directly to the public," it is a telecommunications service. On its face, the definition applies whether the offer or fee is for a stand-alone service or part of a bundled package. The FCC, of course, is not free to insert words into a statute that Congress did not supply. *See United States v. Calamaro*, 354 U.S. 351, 359 (1957).

More importantly, the statute's purported silence regarding how to classify "cable modem service," on which the FCC places so much weight, is illusory. It is undisputed that the cable pipeline, when sold on a stand-alone basis, is a telecommunications service within the plain meaning of § 153(46):

> To be sure, if a cable modem service provider made a "stand-alone offering of transmission for a fee directly to the public," Pet. App. 97a, such that subscribers could pay for and use the transmission without the information service capabilities that go along with Internet access service, then such a provider might well be "offering" telecommunications and thus providing a telecommunications service.

FCC Br. 24. Nothing in the Act dictates a different conclusion just because a company's marketing department chooses to sell that pipeline with various information services to the public at a single price. The Act already clearly specifies how to classify an Internet connection, like the high-speed pipeline that is a component of cable modem service. And the Act already clearly specifies how to classify Internet-based services, such as e-mail, that is the other component of cable modem service. The Act, in short, already completely dictates how to classify everything that the FCC calls cable modem service.

The Act does not speak to the status of so-called "hybrid" services like those described by the FCC (*see, e.g.*,

FCC Br. 6), because there is no such thing. Cable modem service is just a package of legally discrete services marketed together to the public. Any "gap" in the definitions that the FCC claims discretion to fill is of the FCC's own creation, because nothing in the Act requires – or even permits – the FCC to view the components of a "hybrid" service as anything other than having legally discrete components, and to evaluate their appropriate classifications individually.[7] The FCC may have discretion under *Chevron* to resolve ambiguities, but it does not have discretion to create them as a means of expanding its authority by making new law.

The Act, in fact, reflects Congress' understanding that services might be marketed together without altering their individual legal statuses. In § 153(44), the Act defines a "telecommunications carrier" as "any provider of telecommunications services," and specifies that Title II's requirements apply "*only to the extent* that [the provider] is engaged in providing telecommunications services." (emphasis added.) This language clearly demonstrates that Congress necessarily contemplated that companies may bundle both telecommunications services and information

[7] Two facts about cable modem service illustrate this point. First, as discussed below, although cable companies require consumers to buy a bundled package, consumers need not avail themselves at all of the cable companies' information services to use the Internet. Instead, they can bypass the cable companies' e-mail, home page, etc. entirely, and "click through" to use those services as provided by someone else. *See infra* at 21-22. Second, there is nothing that technically prevents the cable company from unbundling these services, and indeed, the FCC has forced DSL providers to do exactly that. The contention that the cable modem service somehow inextricably intertwines the two services, Cable Ind. Br. 23, is patently false.

services for sale to consumers. Pet. App. 32a-33a. "To the extent that" a cable company chooses to market two legally discrete services as a package for a single price, that marketing tactic does not affect the legal status of either service.[8] A telecommunications pipeline remains a "telecommunications service" under § 153(46) whether or not it is bundled with an information service like e-mail or a personal web page.

Indeed, the FCC's interpretation yields the absurd result – which Congress could not have intended – that companies could bundle themselves out of regulation. *See Haggar Co. v. Helvering*, 308 U.S. 389, 394 (1940) (statute should be read to avoid absurd results when another reading is consistent with its words and purpose). On the basis of the FCC's interpretation, any company offering, or planning to offer, a high-speed Internet pipeline to the public (or any other telecommunications service), could exempt itself from regulation by the simple expedient of marketing that service together with voice mail, e-mail, or some other information service. Even dial-up telephone service could, on the FCC's theory, cease to exist as a telecommunications service if the telephone company chose to sell voice mail service bundled with the telephone pipeline.

The FCC's claim that the telecommunications transmission component of cable modem service is "part and parcel" of the information services component not only

[8] When one considers the definition of "telecommunications carrier" in § 153(44), which the FCC virtually ignores, together with the Act's definitions of "telecommunications service" in § 153(46), "telecommunications" in § 153(43), and "information service" in § 153(20), it becomes evident that Congress had no need to speak to the status of a so-called "hybrid" service, like cable modem service, because such a hybrid service is a fiction.

fails as a matter of law, it is not even correct as a matter of actual practice. As the FCC itself concedes, a subscriber can bypass the cable operator's ISP, and "click through" to reach the ISP of his choice. Pet. App. 57a-58a. In that circumstance, the subscriber bypasses the e-mail account, the personal web page, and the like offered by the cable operator, and instead uses only the "transparent, unenhanced transmission path" – a path that the FCC previously has classified as a "telecommunications service" – to reach his chosen ISP. *In re Deployment of Wireline Services Offering Advanced Telecomms. Capability*, 13 F.C.C.R. at 24,030, ¶ 36. The subscriber, however, is compelled to pay a monthly fee directly to the cable company for the cable operator's information services that the subscriber does not use. Other than a customer's desire to avoid paying twice for ISP-type services, there is nothing that technically precludes a customer from using the cable operator's high-speed pipeline to connect to another ISP. That indisputable fact undermines any notion that the pipeline is "integral" to the cable operator's information services.

The FCC's classification here of a high-speed transmission pipeline as part and parcel of the information services with which the pipeline is bundled for sale is not even consistent with its own application of the statute in similar contexts. The FCC long ago repudiated the notion that a telephone company could escape regulation of its telecommunications transmission service as common carriage under Title II simply by packaging such service with information services for public sale. *In re Filing and Review of Open Network Architecture Plans*, 4 F.C.C.R. 1, 141, ¶ 274 (1988). As the FCC repeatedly has explained, a telecommunications service does not lose its character as such because it is marketed with information services. *See*

id.; *In re Independent Data Communs. Mfrs. Ass'n, Inc.*, 10 F.C.C.R. 13,717, 13,722-723, ¶¶ 44-45 (1995); *Universal Serv. Report*, 13 F.C.C.R. at 11,530, ¶ 60. The FCC has also uniformly stated, consistent with § 153(44), that to the extent that a telephone carrier simultaneously offers high-speed transmission bundled with information services, the high-speed transmission nonetheless retains its status as a common carrier service that must be offered on nondiscriminatory and reasonable terms to competing ISPs. *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 F.C.C.R. at 24,030-31, ¶ 37 (even if DSL service is offered with information services, DSL service remains a telecommunications service that telephone carriers are compelled to offer to competing ISPs). Moreover, contrary to its litigation position here, *see* FCC Br. 24, the FCC previously has acknowledged that from the customer's perspective, Internet access might look like one service, but the statutory definitions of the 1996 Act required the FCC to classify the two services separately: "the first service is a telecommunications service (*e.g.*, the xDSL-enabled transmission path), and the second service is an information service, in this case Internet access." *Id.* at 24,030, ¶ 36. Given the FCC's apparent inability to apply the statute consistently, the FCC undermines any claim for deference under *Chevron* to its statutory interpretation here. *See I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 447 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is entitled to considerably less deference than a consistently held agency view." (citation and quotation omitted)).

b. Notwithstanding the above, to make its bundling theory work – *i.e.*, a telecommunications service if sold to the public on a stand-alone basis ceases to exist as a

legally cognizable service when packaged for sale with information services – the FCC has seized upon the phrase "via telecommunications" within § 153(20). It contends that because the definition of "information service" includes references to both an information service and to telecommunications, whereas the definition of "telecommunications service" lacks any reference to information service, categorizing cable modem service – which has both components – as an information service is at least reasonable. FCC Br. 26. The contention is without merit. The inclusion of the phrase "via telecommunications" in § 153(20) does not suggest a congressional intent that "hybrid" services, as the FCC calls cable modem service, are classified as solely an information service. The phrase simply defines "information services" as those that require "telecommunications" or transmission by means of the electromagnetic medium for their delivery, as distinguished from information services that use other media and are beyond the scope of the Communications Act. *See* H.R. Rep. No. 104-204, 1995 WL 442504, at 125-26 (July 24, 1995) (confirming the term "telecommunications" relates to the type of transmission medium underlying the provision of information services). For example, absent the "via telecommunications" clause in the statute, a legal research service that stores, retrieves, organizes and provides to customers binders containing the legislative histories of specific statutes would qualify as an "information service" because it is a service "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information." § 153(20). Similarly, absent the "via telecommunications" clause, all public library services would fall within the ambit of § 153(20). Obviously, these services are not subject to the Communications Act.

The FCC has construed the term "telecommunications" in the same way in order to carefully confine its authority to activities within its jurisdiction. *See Universal Serv. Report*, 13 F.C.C.R. at 11,549, ¶ 99 (explaining that overnight letter delivery service in lieu of a telephone call to convey a message not subject to the Act's universal service funding requirements because such service is not "telecommunications.")

The Act's legislative history further confirms that "'telecommunications service' was distinguished from 'telecommunications' largely in order to exclude internal, privately provided telecommunications networks." Pet. App. 36a (discussing H.R. Rep. No. 104-204, 1995 WL 442504, at 126 (July 24, 1995)). A bank, for instance, might use a private network to connect to its various branches. Cable operators offering high-speed pipelines together with information services are not like banks because they do not use private networks. They offer their services indiscriminately to the public for a fee by interconnecting with the public network.[9]

Additional legislative history clarifies Congress' intent to classify the transmission component underlying Internet services as a telecommunications service as a necessary condition to preserve and advance universal service. The Senate Report explained that:

> As defined under the 1934 Act (as amended by this bill), "telecommunications services" includes

[9] Indeed, contrary to the FCC's claim, FCC Br. 38, the distinction between private and common carriage is not relevant to whether cable modem service is subject to regulation. *See* § 541(d)(2) (cable operator that provides any communication service other than cable service "whether offered on a common carrier or *private contract basis*" may be regulated) (emphasis added).

> the transport of information or cable services, but not the offering of those services. This means that information or cable services are not included in the definition of universal service; what is included is that level of telecommunications services that the FCC determines should be provided at an affordable rate to allow all Americans *access* to information, cable and advanced telecommunications services that are an increasing part of daily life in modern America.

S. Rep. No. 104-23, 1995 WL 142161, at 27 (Mar. 30, 1995) (emphasis in orig.).[10]

The FCC contends that Congress' failure to adopt the Senate's language that defines "telecommunications service" to include the transmission of information services supports its statutory interpretation, FCC Br. 27 n.9, but in omitting the reason why the Senate's language was deleted, the FCC's contention falls apart. When concerns were raised about the states' ability in § 254 to preserve universal service for the transmission of information services, one of the bill's sponsors explained that the Senate's language was deleted simply "to clarify that the carriers of broadcast and cable services are not intended to be classified as common carriers under the Communications Act to the extent that they provide broadcast services or cable services." 141 Cong. Rec. S7996 (1995) (statement of Sen. Pressler). The FCC agreed. *See Universal Serv.*

[10] *See also* S. Rep. No. 104-23 at 18 (definition of "telecommunications" intended to exclude "those services, such as interactive games or shopping services and other services involving interaction with stored information, that are defined as information services." However, "[t]he underlying transport and switching capabilities on which these interactive services are based . . . are included in the definition of "telecommunications services.").

Report, 13 F.C.C.R. at 11,523, ¶ 44. The service at issue here has nothing to do with broadcast or cable services.

In the end, the FCC's statutory argument boils down, in the FCC's own words, to this:

> Given that the Act's definition of "information service" expressly contemplates a "telecommunications" component, whereas the definition of "telecommunications service" does not similarly contemplate an information service component, the regulatory necessity of placing "offering[s]" in one mutually exclusive category or the other amply justifies the FCC's decision to place "mixed" or "hybrid" services like cable modem service on the information services side of the line.

FCC Br. 26.

The FCC's rationale is wholly without merit. As discussed above, the FCC's attempt to create a "hybrid" service derived from a cable company's marketing strategy that requires its own legal classification is contrary to the statute. And the FCC's claim that such a legally distinct "hybrid service" as "cable modem service" even exists is refuted by the statute's legislative history explaining the intent of the phrase "via telecommunications" in the definition of "information service."

B. The FCC's Interpretation Conflicts with the Act's Purposes and the Methods by Which Congress Sought to Achieve Them

Even if the FCC is correct that the Act's definitions are ambiguous, based solely on examining their language, the FCC's interpretation is nonetheless not reasonable, and not entitled to deference. A "statute is to be read as a whole," *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991), and a "provision that may seem ambiguous in

isolation is often clarified by the remainder of the statutory scheme," *Koons Buick Pontiac GMC, Inc. v. Nigh*, 125 S. Ct. 460, 467 (2004) (citations and internal quotations omitted). *See also Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("Ambiguity is a creature not of definitional possibilities but of statutory context") (citation omitted). Here, any residual ambiguity that the FCC might claim to support its plea for deference disappears when one looks not just to the definitions at issue, but to the Act as a whole, and its history and purposes. *See General Dynamics Land Systems, Inc. v. Cline*, 540 U.S. 581, 600 (2004) (declining to afford *Chevron* deference to agency's interpretation of statute where that interpretation was precluded by examination of the "text, structure, purpose, and history" of the statute in question).

1. The FCC's interpretation conflicts with Congress' goals

This is not a case where parties merely disagree with the means the agency has chosen to achieve congressionally-mandated goals. This is a case where the agency effectively has ignored those goals, and refused to comply with the means Congress chose to achieve them.

Fundamentally, the FCC's statutory construction chisels out of the Act its cornerstone: universal access by all Americans to high-speed Internet connections. And by classifying cable modem service as it has, the FCC impermissibly has refused to comply with the methods which Congress specified for achieving the Act's universal service goals. The Act reflects Congress' presumption that universal service will be achieved by nondiscriminatory access to telecommunications services that will spur competition among numerous providers, leading to lower prices for

consumers. *See* H.R. Rep. No. 104-204, 1995 WL 442504, at 47-48 (July 24, 1995). At the same time, the Act presumes that funding mechanisms are necessary to ensure universal telecommunications service to customers living in rural and underserved areas, where competition is not likely to exist or be robust. § 254(d). The FCC's statutory interpretation reads these presumptions, and the specific provisions designed to realize them, out of the Act. *Cf. Universal Serv. Report*, 13 F.C.C.R. at 11,504, ¶ 4 ("rules should not create anomalies or loopholes that can be exploited by those seeking to avoid universal service obligations").

a. In the 1996 Act, Congress sought to expand access by consumers and competitors alike to the high-speed pipelines that connect consumers to the Internet. As one Senator put it, "for consumers and competitors, the open access requirements will do for telecommunications what the Interstate Highway System has done for the shipment of tangible goods and the movement of people and ensure that all competitors will have a way to deliver goods and services to anyone anywhere on the information superhighway." 141 Cong. Rec. S7907 (1995) (statement of Sen. Lott). The FCC's classification of cable modem service, one of these pipelines, as solely an information service is inconsistent with this central objective.

"[O]ne of the fundamental concerns" of the 1996 Act is "[t]he need to protect and advance universal service," S. Rep. No. 104-23, 1995 WL 142161, at 4 (Mar. 30, 1995), to ensure that "no one is barred from benefiting from the power of the Information Age," H.R. Conf. Rep. 104-458, 1996 WL 46795, at 133 (Jan. 31, 1996). Congress thus sought to promote a "pro-competitive, deregulatory national framework," *id.* at 1, that simultaneously promotes ubiquitous and affordable access to advanced technologies

to enable all Americans to connect to the Internet.[11] In order to open up markets to new entrants, Congress retained and built upon the core nondiscrimination and interconnectivity requirements of Title II set forth in §§ 201 and 202. These provisions require a carrier to offer telecommunications service on nondiscriminatory and reasonable terms. The obligations in Title II thus permit the carrier's competitors to access network transmission services necessary to reach their customers. *See* H.R. Rep. No. 104-204, 1995 WL 442504, at 71 (July 24, 1995) ("interconnection requirement in section 201(a) is a cornerstone principle of common carriage, and it is restated here . . . as the local telephone industry undergoes the transition to a competitive market.").

Congress also enacted specific provisions strengthening the Act's universal service policy goal, *see* § 151, to ensure that no one was left out of the "information age." Congress defined universal service broadly

> to ensure that the *conduit*, whether it is a twisted pair wire, coaxial cable, fiber optic cable, wireless, or satellite system, *has sufficient capacity and technological capability to enable consumers* to use whatever consumer goods

[11] "This comprehensive bill strikes a balance between competition and regulation." 141 Cong. Rec. S7896 (1995) (statement of Sen. Hollings). "[T]his bill is also responsibly deregulatory. When it comes to maintaining universal access to telecommunications services, for instance, it does that. It establishes a process that will make sure that rural and small-town America doesn't get left in the lurch. This bill also maintains significant Federal oversight. Telecommunications, remember, isn't like trucking, or railroads or airline transportation. . . . [D]eregulation is always a gradual, transitional process. . . . " 141 Cong. Rec. S7889 (1995) (statement of Sen. Pressler).

> that they have purchased, such as a telephone, personal computer, video player, or television, *to interconnect to services that are available over the telecommunications network.* The Committee does not intend the definition of universal service to include the purchase of equipment, such as a computer or telephone, that is owned by the consumer and is not integral to the telecommunications service itself.

S. Rep. No. 104-23, 1995 WL 142161, at 27 (Mar. 30, 1995) (emphasis added).

To preserve universal service, Congress codified the requirement that all providers of "telecommunications services" support federal universal service funding mechanisms. § 254(d), (f); S. Rep. No. 104-23, 1995 WL 142161, at 4 (Mar. 30, 1995). To advance universal service, Congress specifically mandated that telecommunications carriers make high-speed connections available and affordable to consumers in high-cost and rural areas, to school children and libraries, and to rural health clinics so that they can access the advanced services on the Internet. § 254(b)(2), (3) & (6), 254(h)(1)(A) & (B), 254(h)(2); H.R. Conf. Rep. No. 104-458, 1996 WL 46795, at 132 (Jan. 31, 1996). In § 255(c), Congress additionally required providers of "telecommunications services" to ensure that advanced services are accessible to individuals with disabilities. And in § 706(a), Congress reinforced its intent that all Americans, and in particular school children, have access to the advanced capability, regardless of technology, needed to connect to the Internet, and expressly commanded both the FCC and the states to use "regulating

methods" applicable to "telecommunications services" to make that happen.[12]

b. At the same time, to ease potential regulatory burdens and transition to a deregulatory policy framework, Congress in § 160 gave the FCC a powerful new deregulatory tool of forbearance, which the agency previously lacked. *See MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 234 (1994) ("*MCI v. AT&T*") (overturning FCC's attempt to deregulate by construing statute at odds with congressional intent).[13] With this tool, Congress defined a process by which the FCC could refrain from regulating services that otherwise fall within Title II – such as the high-speed cable pipeline that constitutes the telecommunications service component of cable modem service. Using that process, the FCC may forbear from enforcing a statutory provision if it determines that enforcement of a regulation or provision is "unnecessary to prevent discrimination and protect consumers, and is consistent with the public interest." *Portland*, 216 F.3d at 879.

The statute thus expresses the overriding congressional purpose of promoting universal service, admonishes the FCC to use the same sort of regulating methods it has applied to telecommunications services to further that purpose (*see* § 706(a)), and strikes a balance by allowing

[12] The FCC has conceded that cable modem service is an advanced capability as defined in § 706(c)(1). Pet. App. 132a.

[13] Section 160 was added to the 1996 Act in direct response to *MCI v. AT&T* to give the FCC specific statutory authority to forbear from Title II regulation. *See* 141 Cong. Rec. S7888 (1995) (statement of Sen. Pressler) ("[Section 160] will make it possible for the FCC immediately to forbear from economically regulating. . . . Federal courts have ruled that the FCC cannot deregulate. This bill solves that problem. . . . ").

the agency to use specific procedures (the forbearance procedures in § 160) where the agency determines that an absence of regulation might better achieve Congress' goals.

c. By classifying the high-speed cable pipeline as an information service based solely on the cable operator's decision to sell it with information services, the FCC's Declaratory Ruling vitiates the statutory scheme and frustrates the Act's objectives. Because much of Title II applies only to "telecommunications carriers," "providers of telecommunications services," or "common carriers," none of Title II's requirements would apply to a cable provider of a high-speed pipeline because, under the FCC's theory, a cable provider does not offer a "telecommunications service" when it chooses to bundle the cable pipeline with information services for public sale under the rubric "cable modem service." And despite the FCC's concession that cable modem service is one of the high-speed capabilities defined in § 706(c)(1), the FCC's interpretation conflicts with Congress' directive in § 706(a) that the FCC use "regulating methods" applicable to "telecommunications services" to promote such capabilities.

It is inconceivable that Congress intended to categorically exempt cable operators, who control over two-thirds of the broadband (high-speed) market, and in some areas is the only residential broadband provider, from all of the Act's provisions that promote competitive and universal access to broadband capability. And it is equally inconceivable that Congress would have permitted cable operators to exempt themselves from these provisions simply by choosing to market their high-speed pipeline together with other services at a single price. The statute, consistent with Congress' purposes, categorically includes cable modem service as one of the high-speed capabilities

subject to Title II, and specifies a carefully defined method – regulatory forbearance under § 160 – whereby the FCC (not the cable operators themselves) can exempt the service from regulation.

d. As the briefs of the telephone company Petitioners make clear, the FCC's bundling theory has no principled stopping point. Because any telecommunications service provider could evade regulation entirely simply by deciding to combine an information service for sale with its telecommunications transmission service, the FCC's interpretation potentially would dismantle Title II, and the universal service goals that underlie it.

This is not the first time that the FCC has attempted to read out core provisions of the Act to effectuate its notion of how to achieve the Act's purposes. In *MCI v. AT&T*, in remarkably similar circumstances, the FCC attempted to do the same thing, but this Court forbade it. In that case, the FCC sought to exempt certain long distance carriers from the tariff-filing requirements of § 203(a),"now that there is greater competition" in the long distance market. 512 U.S. at 233. The FCC construed its authority in § 203(b) to "modify any requirement" in Title II as permitting this action. This Court disagreed, stating that § 203(a) was " 'utterly central' to the administration of the Act," *id.* at 230, that the FCC effected a "fundamental revision of the statute," *id.* at 231, and that the FCC had circumvented the means chosen by Congress to prevent unreasonable and discriminatory charges, *id.* In affirming the judgment below, the Court stated: "For better or worse . . . the Commission's desire to increase competition cannot provide it authority to alter the well-established statutory filed rate requirements." *Id.* at 234 (citation and quotation omitted).

The FCC's statutory construction here is no less radical. As in *MCI*, the FCC has exempted certain providers from the core obligations of Title II, based on interpreting a particular term used in the Act. Similarly, as it did in *MCI*, the FCC asserts here that its interpretation should be adopted because a "hands-off policy" provides a better means to achieve the purposes of the Act. FCC Br. 30. For the same reasons stated in *MCI*, the FCC's construction here cannot stand because it carves out requirements that are central to the Act's administration, and, like the FCC's order in *MCI*, would effectively introduce "a whole new regime of regulation (or of free-market competition)." *MCI v. AT&T*, 512 U.S. at 234. Although that "may well be a better regime" to achieve the Act's purposes, "[that] is not the one that Congress established." *Id.*; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency").

Indeed, the FCC's reading of the Act is even more extravagant than it was in *MCI*. If, in *MCI*, it was "highly unlikely that Congress would leave the determination of whether [long distance carriers] will be entirely, or even substantially, rate-regulated to agency discretion," *MCI v. AT&T*, 512 U.S. at 231, it is exceedingly unlikely that here Congress would have left the decision to deregulate to the cable operators (and potentially all carriers) themselves, based on how they choose to market their services to the public. The FCC's statutory interpretation in this case is all the more remarkable because it evades § 160, the regulatory forbearance provision added by Congress in

direct response to *MCI*.[14] Congress could have chosen to deregulate high-speed services, like cable modem service, altogether. Instead, in § 160 Congress prescribed a specific process with specifically defined criteria by which the FCC could refrain from applying any provision or regulation applicable to the telecommunications service component of cable modem service. In fact, in § 706(a), Congress identified regulatory forbearance as one of the "regulating methods" by which the FCC could promote the deployment of high-speed services, which concededly includes cable modem service. Pet. App. 132a. The FCC is not free to circumvent that process, as it has done here, by interpreting the Act in a way that achieves the same goal.

2. The FCC's claims that its interpretation is consistent with the Act's purposes are without merit

The FCC's attempts to demonstrate that its interpretation of the Act is consistent with the Act's goals are unconvincing. First, the FCC argues that unless its interpretation is adopted, cable operators will be subject to a gamut of regulatory requirements that will stifle the deployment of cable modem service. FCC Br. 30-31. Second, the FCC claims that even though its interpretation categorically exempts cable operators from Title II regulation (as explained above), the FCC nevertheless retains ancillary authority under § 152(a) of Title I to impose some or all of Title II's requirements as "necessary and appropriate" to safeguard consumer interests. The FCC is wrong on both counts.

[14] *See* note 13 *supra*.

On the first point, the FCC improperly conflates the question of how Congress classified cable modem service under the Act – the issue properly before this Court – with the question of whether cable modem service should be regulated – an issue not before this Court. All of the FCC's arguments about why it thinks cable modem service should not be regulated are beside the point. *MCI v. AT&T*, 512 U.S. at 234 ("A desirable policy cannot alter the meaning of the Federal Communications Act of 1934.")[15] Congress defined a specific process in § 160 by which the FCC may refrain from subjecting the telecommunications service component of cable modem service to any provision or regulation, and the FCC may not dodge that process because it wants to achieve the Act's goals in an easier way.

Moreover, a regulatory scheme under which the FCC would enjoy unfettered discretion to impose or not impose obligations on cable modem providers "as necessary or appropriate," Pet. App. 134a; FCC Br. 12 n.7, vitiates the scheme that Congress actually adopted. In fact, the FCC has it backwards. As discussed, the high-speed cable connection to customers is subject to Title II, and if the agency wishes to refrain from imposing any of Title II's requirements, then it must scrupulously make the determinations required in § 160. This case is thus not – as the

[15] To be sure, if a statute is ambiguous, *Chevron* allows the FCC to choose among a range of *reasonable* interpretations on the basis of policy because that choice is a political question, *see* 467 U.S. at 865, but policy considerations do not define the range of reasonable interpretations among which the FCC may choose. Thus, the FCC's policy arguments about why cable modem service *should* not be regulated are not relevant to whether the FCC's interpretation is reasonable.

FCC contends – about a court's attempt to substitute its judgment for that of the FCC on how best to achieve the Act's purposes. It is about the FCC's impermissible attempt to substitute its own judgment for that of Congress.

On the FCC's second point, even if, in theory, the FCC could exercise ancillary authority, that authority would not allow the FCC to impose any of Title II's requirements on cable modem providers which, according to the FCC, are not telecommunications carriers. As explained in *FCC v. Midwest Video Corp.*, 440 U.S. 689, 697 (1979), Title I gives the FCC authority only over that which is "reasonably ancillary to the effective performance of [its] various responsibilities" under the Act. Put differently, the FCC must identify specifically delegated powers under the Act to which the agency's authority is ancillary. Title I is not an independent source of regulatory authority. *California v. FCC*, 905 F.2d 1217, 1241 n.36 (9th Cir. 1990).[16] The only possible source of expressly delegated responsibilities here would be Title II, but inasmuch as the FCC has exempted providers of cable modem service from Title II, the FCC can cite no specific responsibility to which its ancillary authority would attach. Without that nexus, the FCC has no authority to impose a Title II obligation on cable modem providers as the FCC sees fit. Pet. App. 145a-150a

[16] The FCC likewise could not rely on either § 154(i) or § 706. *Southwestern Bell Tel. Co. v. FCC*, 168 F.3d 1334, 1350 (D.C. Cir. 1999) (§ 154(i) only provides FCC with ancillary authority to meet its obligations in other of the Act's provisions); *In re Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. at 24,044, ¶ 69 (§ 706 not an independent source of authority). The policy statements in § 230 are equally unavailing. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 370 (1986) (rejecting FCC's reliance on § 151 policy statement as source of preemptive authority).

(discussing open access requirement). Indeed, in *Midwest Video*, this Court overturned the FCC's similar attempt to impose requirements tantamount to common carriage on broadcasters on the basis of its ancillary authority. *See Midwest Video*, 440 U.S. at 706.

In sum, Congress did not give the FCC unbridled discretion to promote the Act's goal of a "pro-competitive, deregulatory" framework subject to none of the safeguards and none of the regulatory processes that Congress prescribed to achieve that goal. By adopting a statutory interpretation that removes cable providers, and potentially all broadband transmission providers, from the scope of Title II, the FCC negates the Act's core nondiscriminatory access and universal service requirements – the principal means by which Congress sought to expand the range of competitive and affordable service choices available to all Americans. If Congress had believed that deregulation alone would promote the Act's goals, then there would have been no need for Congress to leave most of Title II intact, no need to direct the FCC in § 706(a) to use regulatory methods governing telecommunications services as the means by which to promote broadband capability, and no need to specify a process in § 160 by which to ease common carrier requirements as markets transition to full competition.

C. The FCC's Interpretation Conflicts with Other Provisions of the Act

1. Section 706's promotion of ubiquitous access to high-speed connections

A careful consideration of § 706 – the very provision that Congress included to promote ubiquitous access to high-speed pipelines that connect customers to the Internet – makes clear why the FCC's interpretation is not

reasonable.[17] In § 706(c)(1), Congress defined this access as "advanced telecommunications capability" "without regard to any transmission media or technology." This definition includes cable modem service, as the FCC concedes. Pet. App. 132a. In § 706(a), the portion that the FCC consistently neglects to discuss, Congress defined the particular means by which the FCC should promote high-speed capability. In that section, Congress directed both the FCC and the states "with regulatory jurisdiction over telecommunications services" to use "regulating methods," such as "price cap regulation," "measures that promote competition,"[18] and "regulatory forbearance," to ensure that this advanced capability is affordable and accessible. *See* S. Rep. No. 104-23, 1995 WL 142161, at 51 (Mar. 30, 1995) ("the bill encourages States and the FCC to utilize *regulatory* incentives – and in particular, alternative regulation proceedings – as a means to promote the deployment of broadband capability") (emphasis added).[19] These regulatory methods pertain only to telecommunications services subject to Title II, yet the FCC's classification of cable modem service exempts the service from Title II regulation.

[17] Section 706 is reproduced at the note to § 157.

[18] Contrary to the suggestion of Petitioners, the phrase "measures that promote competition" is properly understood to refer to "regulatory" measures as well, in light of the specific terms that surround it, all of which are forms of regulation. *See Federal Maritime Comm'n v. Seatrain Lines, Inc.*, 411 U.S. 726, 734 (1973) ("catchall provision" is to be "read as bringing within a statute categories similar in type to those specifically enumerated").

[19] "Alternate forms of regulation" are those that do not include rate of return regulation. S. Rep. No. 104-23, 1995 WL 142161, at 49 (Mar. 30, 1995).

It is simply not a sensible reading of the statute to conclude that in one provision Congress would direct agencies to use their regulatory authority to promote the deployment of high-speed transmission capability to all Americans, and in another provision exempt from regulation an entire class of high-speed transmission services.

2. Section 254's promotion of affordable access to high-speed connections

The FCC's interpretation also conflicts with § 254, in which Congress sought to ensure that all Americans have affordable access to high-speed connections to the Internet. After identifying in § 254(b)(2) universal access to advanced telecommunications and information services as an important principle, Congress in § 254(d) directed that all telecommunications providers offering telecommunications services contribute to funding mechanisms to ensure that such access is affordable. As the FCC has acknowledged, Congress' purpose was to "expand[] the class of entities that must contribute to federal universal service support mechanisms," since prior to the Act, only interexchange carriers were required to contribute. *Universal Serv. Report*, 13 F.C.C.R. at 11,553, ¶ 108.

Yet, the FCC's statutory interpretation has the perverse result of shrinking the base of those required to fund universal service by exempting any entity, including a telephone company offering dial-up service, that simply tacks on an information service for sale with its telecommunications service. Taking the FCC's bundling theory to its logical end, potentially no entity would qualify as a telecommunications carrier offering a telecommunications service. As a result, no entity would be statutorily required to contribute to mechanisms that support

service to low-income, rural, or disabled customers, or to schools, libraries and rural health-care providers.

In an effort to avoid this outcome, the FCC cites text in § 254(d) that allows the FCC to compel other telecommunications providers to contribute to universal service. FCC Br. 4 n.2. Once again, the FCC reads the statute backwards. Congress intended the FCC to *supplement* an expanded base of contributors to universal service funding, not to eliminate the base and then permit the agency, with unfettered discretion, to decide who must contribute. Congress' intent is confirmed by § 254(d)'s legislative history that makes clear its purpose to enable the FCC to require contributions from "private telecommunications providers," described as "those who bypass the public switched telephone network through their own or leased facilities." S. Rep. No. 104-23, 1995 WL 142161, at 28 (Mar. 30, 1995). Congress explained that "[i]n the event that the use of private telecommunications services or networks becomes a significant means of bypassing networks operated by telecommunications carriers, the bill retains the FCC's authority" to require "all telecommunications providers to contribute" – both public and private. *Id.*

Cable modem providers are not private telecommunications providers because they do not bypass the public network. They offer their services indiscriminately to the public by interconnecting with the public network.

3. The statute's mandate regarding technological neutrality

The FCC's interpretation also conflicts with the Act's intent to classify functionally similar services in the same way, regardless of the facilities used or technology deployed.

In recognition of the growing convergence of the cable and telephone industries, Congress was well-aware that cable operators would provide telecommunications services in addition to cable TV services, that these telecommunications services would compete directly with similar services offered by telephone companies, and that such telecommunications services would be subject to Title II. *See* § 541(d)(1); *City of Dallas v. FCC*, 165 F.3d 341, 354 n.13 (5th Cir. 1999) (primary goal of the 1996 Act was to facilitate cable companies becoming telephone companies). For that reason, Congress made the Act technologically neutral so that the Act's provisions apply in the same manner, regardless of whether the service in question is based on dial-up, DSL, cable, or some other technology. § 153(46), § 706(c)(1). The FCC's Declaratory Ruling does not heed Congress' directive. Its classification of cable modem service deviates from the agency's classification of other Internet connection services, like DSL service, that are distinguishable only by their differing technologies. *In re Deployment of Wireline Servs. Offering Advanced Telecommunications Capability,* 13 F.C.C.R. at 24,030, ¶ 36.

The FCC searches in vain for a rationale for distinguishing cable modem service providers from other providers of high-speed Internet service, but none has merit. First, the FCC attempts to rationalize why cable modem service deserves differential treatment by arguing that cable operators "have not historically been viewed as common carriers." FCC Br. 17. The FCC hangs its hat on a similar historical argument elsewhere in contending that cable modem service is exempt from the Computer II framework because that framework has been applied "exclusively to traditional wireline services and facilities." Pet. App. 100a, 102a. That the history may be this way, however, does nothing to render reasonable the FCC's

statutory interpretation, especially when one considers that the reason for that historical anomaly is merely the FCC's consistent refusal to address the legal status of cable modem service until this case.

Second, and related, the FCC argues that cable operators – unlike telephone carriers – are not common carriers because they offer their high-speed services over cable, not telephone, facilities. Pet. App. 100a, 102a. The FCC, however, neglects to mention that many cable companies currently offer, as certificated common carriers, voice transmission services over these same cable facilities. Pet. App. 101a-102a. In any event, the character of the facilities over which cable operators provide their service is irrelevant. As the Act makes clear, an entity is a common carrier because it "offers telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public" §§ 153(44) & (46). Cable operators do just that – they offer their high-speed cable pipeline to the public for a fee. That offering constitutes a "telecommunications service" under § 153(46), just as the offering of the DSL pipeline constitutes a "telecommunications service." The FCC does not have "unfettered discretion ... to confer or not confer common carrier status on a given entity, depending upon the regulatory goals it seeks to achieve." *Nat'l Ass'n of Reg. Util. Comm'rs v. FCC*, 525 F.2d 630, 644 (D.C. Cir. 1976).

Third, the FCC argues that telephone companies historically differ from cable companies because the FCC has compelled telephone companies to offer their high-speed DSL service on a stand-alone basis even if it is bundled with information services. Pet. App. 102a; *see In re Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 16 F.C.C.R. 7418, 7444, ¶¶ 44 & 46

(2001). That fact, however, derives merely from the historical anomaly that telephone companies have existed for a long time, and started out when there was no Internet. It does not reflect any fundamental difference between cable and DSL or other broadband services that might cause one service but not the other to fall within the ambit of the Act's definition of "telecommunications service." Indeed, the history that is relevant is the "evolution of advanced telecommunications regulation prior to the 1996 Act [that] reflects the same underlying belief that widespread access to 'basic' transmission facilities would spur competition in 'enhanced services' and provide consumers with a wider variety of more closely tailored products." Pet. App. 35a (Thomas, J., concurring, citation omitted).

4. Classifying cable modem service as partly a telecommunications service will not mean that all ISPs will become regulated

The FCC contends, in lockstep with its supporters, that if cable modem service is partly a telecommunications service, then all ISPs will become regulated – a result inconsistent with the Act's purpose. FCC Br. 36 (*citing* Pet. App. 101a); Cable Ind. Br. 20, 22. That contention is baseless.

First, to the extent that a cable operator combines the public sale of its high-speed cable pipeline with some information services, only the high-speed pipeline would be subject to regulation. § 153(44) (a "telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunication services"). The information services would remain unregulated.

Second, the FCC itself has consistently treated ISPs that merely lease transmission services from common carriers as customers of those carriers, and not as carriers themselves. *Universal Serv. Report*, 13 F.C.C.R. at 11,540, ¶¶ 106, 146-147. Nothing in the Act requires the FCC to treat these ISPs as common carriers. But even if ISPs that control no transmission facilities were carriers, nowhere does Congress suggest that the FCC must regulate the high-speed transmission service twice – once when the common carrier leases it to the ISP as its customer, and again when the ISP connects the service to its own customer. What the FCC repeatedly ignores is that somebody must provide a transmission service to the ISP, and that somebody is the entity that controls the transmission facilities.[20] With respect to the high-speed connection via a cable pipeline, that entity is the cable operator.

Despite the above, the FCC suggests that because the Act does not exclude non-facilities-based ISPs from regulation, the FCC would be compelled to regulate them if its statutory construction is not adopted. FCC Br. 36. Courts, however, "generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts." *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988). The FCC itself applied that principle in discerning congressional intent to maintain the Computer II framework that exempts ISPs which own no transmission facilities from regulation. *See Universal Serv. Report*, 13 F.C.C.R. at 11,540, ¶ 81. Viewing the Act in light of its history, the FCC stated:

[20] The Telecommunications Industry Ass'n ("TIA") acknowledges that its members must purchase "telecommunications" transmission services from a common carrier in order to provide their information services. TIA Br. 15.

> [W]e note that at the time the statute was enacted, the Computer II framework had been in place for sixteen years. Under that framework, a broad variety of enhanced services were free from regulatory oversight, and enhanced services saw exponential growth. Accordingly, a decision by Congress to overturn Computer II, and subject those services to regulatory constraints by creating an expanded "telecommunications service" category incorporating enhanced services, would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so. As a result, looking at the statute and the legislative history as a whole, we concluded that Congress intended to maintain the Computer II framework.

Id. at 11,524, ¶ 45 (footnotes omitted).[21]

Thus, by the FCC's own admission, nothing in the Act suggests that the FCC must regulate non-facilities-based ISPs. At the same time, by conceding that Congress maintained the Computer II framework in the 1996 Act, unless the FCC exercises its forbearance authority under § 160, nothing in the Act permits the FCC to categorically exempt from regulation cable operators who control the

[21] The FCC explained that the deletion of language that would have "expanded" the definition of telecommunications service was simply "intended to clarify that carriers of broadcast or cable services are not intended to be classified as common carriers under the Communications Act to the extent they provide broadcast or cable services." *Universal Serv. Report*, 13 F.C.C.R. at 11,523, ¶ 44.

transmission facilities over which information services are provided. It is not legitimate for the FCC to claim that Congress retained only that part of Computer II that supports its theory.

In the end, the issue is not that under the Ninth Circuit's interpretation of the statute all ISPs become regulated telecommunications carriers but that, under the FCC's statutory interpretation, all telecommunications carriers become unregulated ISPs. As a result, none of Title II's requirements, applicable only to telecommunications carriers, and the consumer protections attendant to them would apply to *any* entity that simply bundled its telecommunication service with information services for public sale. Not only would the mandatory funding requirements to support ubiquitous and affordable access to broadband service by school children, rural health care providers, and the disabled become a dead letter, but other provisions of the Act would suffer the same fate. Among other things, the FCC would be powerless to safeguard the privacy of a customer's proprietary information pursuant to § 222;[22] states would be unable to manage their public rights of way under § 253(c); and law enforcement would be hamstrung in securing the safety of all Americans under § 229. In short, far from being "'most faithful' to the 1996 Act and 'its policy goals of competition, deregulation and universal service,'" the FCC's interpretation could hardly be more destructive of them. FCC Br. 26. The FCC's interpretation cannot stand.

[22] The FCC's claim that, under § 551, cable operators could be subject to privacy provisions, leads to the anomalous result that consumer privacy rights depend on the technology deployed, a result at odds with congressional intent.

CONCLUSION

Chevron requires a court to defer to an agency's statutory interpretation only if the agency's interpretation is reasonable in light of the statutory text at issue, construed in light of the statute's history, structure, and purposes. *General Dynamics*, 540 U.S. at 600. It is only after all of these "devices of judicial construction have been tried and found to yield no clear sense of congressional intent" that *Chevron* comes into play. *Id.* Here, the plain text of the statute's definitions dictates that the high-speed pipeline offered by cable companies to enable residential consumers to connect to the Internet is a "telecommunications service." Nothing in the definitions supports the FCC's view that the pipeline loses that legally distinct character just because a company chooses to market the pipeline with other services.

And even if the definitions were not perfectly clear on this point, the Act's purpose and structure, as informed by the Act's history, preclude the FCC's interpretation. The Act's central purpose is to promote affordable and universal access to the Internet. Its structure requires the FCC to classify the pipelines that provide that access as a telecommunications service, and to afford consumers the protections of Title II, unless the FCC makes the specific findings that § 160 requires to allow the FCC to forbear.

The FCC's interpretation of the statute undermines the Act's core purpose and structure by effectively putting the decision whether to be regulated into the hands of corporate marketing departments. This is not a result Congress possibly could have intended. Accordingly, for the

reasons stated, the judgment of the court of appeals should be affirmed.

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STATUTORY APPENDIX

47 U.S.C. § 153 Definitions

(20) Information service

The term "information service" means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.

(43) Telecommunications

The term "telecommunications" means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received.

(44) Telecommunications carrier

The term "telecommunications carrier" means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in section 226 of this title). A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage.

(46) Telecommunications service

The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used.

Advanced Telecommunications Incentives

Section 706 – Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, as amended Pub.L. 107-110, § 1076(gg), Jan. 8, 2002, ~~115~~ Stat. 2093 (uncodified, but reproduced at note to 47 U.S.C. § 157) provided that:

(a) In general. – The Commission and each State commission with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience, and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.

(b) Inquiry. – The Commission shall, within 30 months after the date of enactment of this Act [Feb. 8, 1996], and regularly thereafter, initiate a notice of inquiry concerning the availability of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) and shall complete the inquiry within 180 days after its initiation. In

the inquiry, the Commission shall determine whether advanced telecommunications capability is being deployed to all Americans in a reasonable and timely fashion. If the Commission's determination is negative, it shall take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment and by promoting competition in the telecommunications market.

(c) Definitions. – For purposes of this subsection:

(1) Advanced telecommunications capability. – The term 'advanced telecommunications capability' is defined, without regard to any transmission media or technology, as high-speed, switched, broadband telecommunications capability that enables users to originate and receive high-quality voice, data, graphics, and video telecommunications using any technology.

(2) Elementary and secondary schools. – The term 'elementary and secondary schools' means elementary and secondary schools, as defined in section 9101 of the Elementary and Secondary Education Act of 1965 [20 U.S.C. § 7801].

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47 U.S.C. § 160 Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in

any or some of its or their geographic markets, if the Commission determines that –

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such provision or regulation is consistent with the public interest.

(b) Competitive effect to be weighed

In making the determination under subsection (a)(3) of this section, the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to which such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

. . . .

---

47 U.S.C. § 254 Universal Service

(b) Universal service principles

The Joint Board and the Commission shall base policies for the preservation and advancement of universal service on the following principles:

. . . .

(2) Access to advanced services

Access to advanced telecommunications and information services should be provided in all regions of the Nation.

(3) Access in rural and high cost areas

Consumers in all regions of the Nation, including low-income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information services, including interexchange services and advanced telecommunications and information services, that are reasonably comparable to those services provided in urban areas and that are available at rates that are reasonably comparable to rates charged for similar services in urban areas.

(4) Equitable and nondiscriminatory contributions

All providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service.

. . . .

(6) Access to advanced telecommunications services for schools, health care, and libraries

Elementary and secondary schools and classrooms, health care providers, and libraries should have access to advanced telecommunications services as described in subsection (h) of this section.

(d) Telecommunications carrier contribution

Every telecommunications carrier that provides interstate telecommunications service shall contribute, on an equitable and nondiscriminatory basis, to the specific, predictable, and sufficient mechanisms established by the Commission to preserve and advance universal service. The commission may exempt a carrier or class of carriers from this requirement if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's contribution to the preservation and advancement of universal service would be de minimis. Any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

. . . .

(h) Telecommunications services for certain providers

(1) In general

(A) Health care providers for rural areas

A telecommunications carrier shall, upon receiving a bona fide request, provide telecommunications services which are necessary for the provision of health care

services in a State, including instruction relating to such services, to any public or nonprofit health care provider that serves persons who reside in rural areas in that State at rates that are reasonably comparable to rates charged for similar services in urban areas in that State. A telecommunications carrier providing service under this paragraph shall be entitled to have an amount equal to the difference, if any, between the rates for services provided to health care providers for rural areas in a State and the rates for similar services provided to other customers in comparable rural areas in that State treated as a service obligation as a part of its obligation to participate in the mechanisms to preserve and advance universal service.

(B) Educational providers and libraries

All telecommunications carriers serving a geographic area shall, upon a bona fide request for any of its services that are within the definition of universal service under subsection (c)(3) of this section, provide such services to elementary schools, secondary schools, and libraries for educational purposes at rates less than the amounts charged for similar services to other parties. The discount shall be an amount that the Commission, with respect to interstate services, and the States, with respect to intrastate services, determine is appropriate and necessary to ensure affordable access to and use of such services by such entities. A telecommunications carrier providing service under this paragraph shall –

(i) have an amount equal to the amount of the discount treated as an offset to its obligation to contribute to the mechanisms to preserve and advance universal service, or

(ii) notwithstanding the provisions of subsection (e) of this section, receive reimbursement utilizing the support mechanisms to preserve and advance universal service.

(2) Advanced services

The Commission shall establish competitively neutral rules –

(A) to enhance, to the extent technically feasible and economically reasonable, access to advanced telecommunications and information services for all public and nonprofit elementary and secondary school classrooms, health care providers, and libraries; . . .

. . . .

RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

(9) (9)

Supreme Court, U.S.
FILED
JAN 18 2005

Nos. 04-277 & 04-281

IN THE
Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Petitioners,

AND

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, ET AL.,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS BELLSOUTH AND SBC IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Federal Communications Commission is permitted to conclude that broadband Internet access does not include a "telecommunications service" under the Telecommunications Act of 1996, but rather is solely an "information service."

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, respondents BellSouth Corporation, BellSouth Telecommunications, Inc., and SBC Communications Inc. state the following:

BellSouth Telecommunications, Inc. is a wholly owned subsidiary of BellSouth Corporation, a publicly held corporation. BellSouth Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

SBC Communications Inc. has no parent company, and no publicly held company owns 10% or more of its stock.

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PRELIMINARY STATEMENT

This case involves the efforts of the Federal Communications Commission ("FCC" or "Commission") to bring coherence to the regulation of the market for broadband Internet access services. In the Telecommunications Act of 1996 ("1996 Act" or "Act"), Congress specifically directed the FCC to "encourage the deployment" of broadband services by, among other things, "utilizing . . . measures that promote competition" and "remov[ing] barriers to infrastructure investment." 47 U.S.C. § 157 note. That ambitious goal, however, has gone largely unfulfilled, as the industry has labored under a patchwork of confused and contradictory regulatory rules that generally predate the 1996 Act, that are predicated on outdated technologies, and that forestall the substantial investment necessary to bring broadband to all consumers.

Recognizing this, the FCC—beginning fully four years ago—took definitive steps towards establishing a coherent regulatory framework that applies equally to all providers of broadband, including not just the cable providers that are petitioners here, but also telephone companies such as respondents SBC and BellSouth. The FCC order at issue here is a key part of that effort. It classified cable modem service—the leading broadband Internet access service—as an "information service" under the 1996 Act, and it set the stage for the FCC to construct a coherent broadband regulatory framework around that classification. Indeed, at the same time as it released the order at issue here, the FCC tentatively concluded that the same classification applies to the wireline broadband Internet access provided by telephone companies (*i.e.*, Digital Subscriber Line ("DSL") Internet access services), and it further announced an initiative to develop a deregulatory policy framework, based on that classification, that "encourage[s] the ubiquitous availability of broadband to all Americans," that "promotes investment and innovation in a competitive market," and that "is consistent, to the extent possible, across multiple platforms." Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access*

to the Internet over Wireline Facilities, 17 FCC Rcd 3019, 3021-23, ¶¶ 3-6 (2002) ("*Wireline Broadband NPRM*").

The Ninth Circuit's decision below throws that process into disarray. In reliance on circuit precedent in a case to which the FCC was not even a party—and in direct conflict with the considered judgment of the expert agency—the decision below declares that, as a matter of pure statutory interpretation, broadband Internet access provided over cable necessarily includes a "telecommunications service" and is thus subject to common-carrier regulation under Title II of the Communications Act of 1934. That determination, and the circuit precedent on which it relies, rests on elemental misconceptions of federal telecommunications law. It should be reversed, and the FCC's classification should be affirmed by this Court, so that the FCC can continue the critically important business of creating a broadband regulatory environment that, as Congress directed, encourages deployment and reduces barriers to investment.

STATEMENT

A. Today's broadband regulatory environment is out-of-step with the realities of the market. Broadband Internet access services are highly competitive. At the time of the order under review, the market was already characterized by "a continuing increase in consumer broadband choices" offered over a wide array of transmission platforms, including cable facilities, telephone lines, satellite, fixed wireless, and mobile wireless. *E.g.*, Third Report and Order and Memorandum Opinion and Order, *Rulemaking to Amend Parts 1, 2, 21, and 25 of the Commission's Rules to Redesignate the 27.5-29.5 GHz Frequency Band, to Reallocate the 29.5-30.0 GHz Frequency Band, to Establish Rules and Policies for Local Multipoint Distribution Service and for Fixed Satellite Services*, 15 FCC Rcd 11857, 11864-65, ¶¶ 18-19 (2000). Today, that trend is even more pronounced. As the Commission recently reported, while cable modem service providers continue to serve comfortably more than half of all broadband Internet access subscribers, the success of other broadband platforms—including DSL, wireless (unlicensed and licensed),

broadband-over-power-lines, and satellite—ensures that broadband will continue to be offered over a "variety of technologies." Fourth Report to Congress, *Availability of Advanced Telecommunications Capability in the United States*, 19 FCC Rcd 20540, 20553, 20557-62, 20568 (2004) ("*Fourth Report*"). In short, "the competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices." *Id.* at 20552.

Despite the fact that various transmission platforms compete directly against one another head-to-head in this highly competitive market—and have been doing so for years—there remains significant uncertainty as to their regulatory status, including whether competing technologies will be regulated uniformly under federal law. Until the order at issue here, for example, the FCC had not classified cable modem service at all, much less articulated rules that would apply to that particular service. As a result, cable operators provided cable modem service largely free from any federal regulation, while at the same time contending with the regulatory efforts of state and local franchising authorities. The FCC has been similarly silent with respect to fixed wireless and satellite, creating uncertainty over the potential scope of regulation with respect to those broadband platforms as well.

Meanwhile, the FCC has regulated DSL service provided by telephone companies—which provide service to barely one-third of broadband consumers—as though it were provided in a monopoly environment. Three decades ago, the FCC initiated a proceeding, known as the *Computer Inquiry*, to examine the relationship between the then-nascent computer industry and the public switched telephone network. *See generally* Report and Order, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 104 F.C.C.2d 958, 966-86, ¶¶ 9-45 (1986) ("*Computer III*"). The various rules that grew out of that proceeding were predicated on the understanding that the public switched telephone network was the exclusive means

for transmitting the "ever expanding variety of information" made possible by new "computerized data processing" technologies, as well as the concern that "the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing." *California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994) ("*California II*"); *see also Computer III*, 104 F.C.C.2d at 969, ¶ 12 (stressing concern that "major carriers could use their control over basic services to discriminate against others' competitive services").

Based on this understanding and concern, the FCC imposed an array of regulatory requirements upon the incumbent telephone companies (such as SBC and BellSouth) insofar as they wanted to provide so-called "enhanced" services. The Commission broadly defined enhanced services to include "any offering over the telecommunications network . . . more than a basic transmission service." Final Decision, *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 420, ¶ 97 (1980) ("*Computer II*"); *see also* 47 C.F.R. § 64.702(a) (defining "enhanced service[s]" as, *inter alia*, services "which employ computer processing applications that act on the format . . . of the subscriber's transmitted information"). And, although the specific rules that governed telephone-company provision of such enhanced services evolved over the next decade, the FCC eventually settled on a regime in which local telephone companies were required to peel off a pure transmission component from their enhanced services offerings, and to provide that stand-alone transmission component to unaffiliated Internet service providers ("ISPs") on a common-carrier basis, pursuant to tariff. *See Computer III*, 104 F.C.C.2d at 964, ¶ 4. As a result, while most service providers—including, for example, database companies such as Lexis/Nexis and fledgling Internet access providers—could offer "enhanced services" free from regulation, telephone companies offering such services also were required to perform what the FCC has properly termed "radical surgery" on their offerings, in order to create and then offer to competing providers a pure transmission service

that the FCC could regulate as common carriage under the Communications Act. *See* FCC Pet. App. 100a-101a (¶ 43). *See generally Wireline Broadband NPRM*, 17 FCC Rcd at 3036-40, ¶¶ 33-42 (discussing history of *Computer Inquiry* regime).

As the FCC has emphasized, the *Computer Inquiry* proceeding was predicated on the existence of a "one-wire world"—*i.e.*, a world in which all service providers, if they wished to offer enhanced services, required access to the public switched telephone network. Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd 22745, 22748, ¶ 5 (2001) ("*Wireline Broadband Non-Dominance NPRM*"). Even so, as telephone companies seeking to compete with the cable providers rolled out competitive broadband Internet access services using DSL, the FCC simply assumed, without scrutinizing the issue, that the *Computer Inquiry* rules applied to those services. *See* Memorandum Opinion and Order, and Notice of Proposed Rulemaking, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011, 24030-31, ¶ 37 (1998) (noting without analysis "that [Bell Operating Companies ('BOCs')] offering information services to end users of their advanced service offerings, such as xDSL, are under a continuing obligation to offer competing ISPs nondiscriminatory access to the telecommunications services utilized by the BOC information services"). That assumption, in turn, resulted in a distorted regulatory regime in which most competing broadband service providers, including the market-leading cable modem providers, operated free from federal regulation, but telephone companies that rely upon their own local exchange facilities to provide DSL did not. The telephone companies alone were required to separate out an underlying broadband transmission path in order to offer it to competing providers on a common-carrier basis pursuant to tariff, without the associated Internet access service.

This haphazard state of regulatory affairs—in which telephone companies that serve barely a third of the market were regulated as dominant, while everyone else was left to guess over the rules that will ultimately apply—has significantly inhibited the deployment of broadband. It created substantial uncertainty over the extent to which various potential broadband platforms will be subject to regulation, and whether they will compete on a level playing field, thus undermining the certainty that is necessary to warrant the massive investments needed to build-out broadband facilities on a widespread basis. Equally important, it increased the costs of telephone companies and thereby diminished their ability to act as a competitive counterweight to the cable companies, thus distorting the competitive process and curtailing investment that would otherwise occur. At least in part as a result, the United States—which once boasted broadband deployment and penetration rates unmatched elsewhere—has slipped to 11th in overall broadband penetration, and as low as 18th in DSL penetration. *See Fourth Report*, 19 FCC Rcd at 20579.

B. Recognizing the compelling need for reform, the FCC undertook a comprehensive effort to bring uniformity and coherence to the regulation of broadband. The *Declaratory Ruling* at issue here is the first step in that effort. There, the FCC for the first time classified broadband Internet access provided over cable facilities. It first reached the unremarkable (and largely uncontested) conclusion that cable modem service is an "information service" under the 1996 Act, a term that, for present purposes, is equivalent to the "enhanced services" designation the FCC developed in the *Computer Inquiry* proceeding. *See* FCC Pet. App. 91a-95a (¶¶ 36-38); *see also* 47 U.S.C. § 153(20) (defining "information service"); First Report and Order and Further Notice of Proposed Rulemaking, *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd 21905, 21955-56, ¶¶ 102-103 (1996) (the 1996 Act's term "information service" includes all "enhanced services"). It then made clear

that the cable operators that provide this service are not subject to the FCC's *Computer Inquiry* rules, and that—contrary to the Ninth Circuit's prior assumption in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 877-78 (9th Cir. 2000)—they therefore need not separate out a distinct pure transmission service and offer it to unaffiliated service providers on a common-carrier basis. *See* FCC Pet. App. 98a-102a (¶¶ 42-44). Furthermore, "[e]ven if [the] *Computer [Inquiry]* rules were to apply" to cable modem service providers, the Commission exercised its discretion to "waive" them, on the theory that such a waiver would "'encourage the deployment . . . of advanced telecommunications capability to all Americans.'" *Id.* at 102a-104a (¶¶ 45-47) (quoting 47 U.S.C. § 157 note). Finally, because the cable operators are not required to offer pure broadband transmission indiscriminately on standardized terms, and because they generally have not elected to do so to date, the FCC concluded that cable modem service does not contain a separable "telecommunications service"—*i.e.*, a pure transmission service offered to competing providers on a common-carrier basis. *See id.* at 95a-98a, 109a-114a (¶¶ 39-41, 52-55). Instead, in those instances where cable operators do provide unadorned transmission to unaffiliated service providers, they do so as "private carriage." *See id.* at 109a-114a (¶¶ 52-55).

Although the *Declaratory Ruling* is a necessary first step in providing clarity and coherence to the regulation of broadband, it does not—indeed, it cannot—stand alone. Rather, it is an elemental principle of federal telecommunications law that like services must be treated alike. Accordingly, at the same time as it classified cable modem service as solely an "information service," the FCC tentatively concluded that the same classification would apply to DSL-based broadband Internet access service. *See Wireline Broadband NPRM*, *supra*. The FCC has further invited comment on a regulatory framework that would apply to *both* DSL-based service and cable modem service. *See id.*; FCC Pet. App. 133a-168a (¶¶ 72-112). Although the FCC's notices are broad and the FCC is reviewing a wide variety of proposals, the Commis-

sion has articulated principles that will guide its analysis of the questions it has posed. As noted at the outset, the Commission has pledged to "encourage the ubiquitous availability of broadband to all Americans," "promote[] investment and innovation in a competitive market," and regulate "consistent[ly], to the extent possible, across multiple platforms." *Wireline Broadband NPRM*, 17 FCC Rcd at 3021-23, ¶¶ 3-6; *see also* FCC Pet. App. 134a-135a (¶ 73).

Thus, before the decision below, the FCC had initiated a comprehensive process with the goal of bringing much needed certainty and coherence to the regulation of broadband Internet access. The Ninth Circuit's decision below, however, has stopped that process in its tracks. The decision correctly holds, consistent with the FCC's order, that broadband Internet access provided over cable is an "information service" under the 1996 Act. But, contrary to the FCC's order—and in reliance on the prior *City of Portland* decision issued before the FCC's ruling—the decision further holds that, as a matter of statutory interpretation, broadband Internet access provided over cable also includes a "telecommunications service" that is subject to common-carrier regulation under Title II of the Communications Act. *See* FCC Pet. App. 21a-22a. As a result, the decision threatens to subject cable modem service—and, by extension, all broadband Internet access services—to the full panoply of regulatory obligations that apply to traditional telecommunications services under Title II of the Communications Act.

SUMMARY OF ARGUMENT

The FCC reasonably concluded that broadband Internet access service provided over cable is an "information service." The 1996 Act defines that term to encompass "a capability for," among other things, "generating, acquiring, storing, . . . utilizing, or making available information via telecommunications," 47 U.S.C. § 153(20), a description that comfortably encompasses broadband Internet access, whether provided over cable facilities or any other transmission platform. Indeed, the Ninth Circuit did not dispute that cable modem service is an "information service" under the 1996 Act.

The FCC's conclusion that broadband Internet access provided over cable does *not* contain a "telecommunications service" is also lawful. The 1996 Act, along with Commission and court precedent, makes clear that a "telecommunications service" is a distinct, stand-alone product that (1) consists of pure transmission and (2) is offered on a standardized, common-carrier basis. Cable modem service, like other broadband Internet access services, is not pure transmission; rather, it is an "information service" that *uses* broadband transmission as part of an integrated service. And, to the extent some cable operators provide a separate broadband transmission product to unaffiliated ISPs, they do so as "private carriage"—*i.e.*, on an individualized, case-by-case basis, without exhibiting the hallmarks of common carriage.

It is accordingly clear that cable providers, as they operate today, do not offer a "telecommunications service" under the Act. The Ninth Circuit's decision to the contrary appears to be based in large part on its views regarding a related but distinct question: whether cable providers *should be required* to offer a telecommunications service—not under the plain terms of the Act, but rather under the *Computer Inquiry* rules or some analogue to those rules. The Ninth Circuit's decision, as illuminated by Judge Thomas's concurring opinion, is rooted in the background principle that, because cable modem service is equivalent to DSL-based Internet access, the two services must be classified in the same manner. But, while that background principle of regulatory parity is correct, it does not necessarily follow that all broadband Internet access service providers should be forced to provide a discrete "telecommunications service" to competing providers. Nothing in the statute suggests that the *Computer Inquiry* rules must necessarily be applied to *any* provider in the highly competitive broadband market, and it is therefore within the discretion of the Commission to determine the proper regulatory treatment of those services. Provided the Commission does so consistently—treating all competing providers of broadband Internet access equally as it has

expressly stated it intends to do—there is no basis on which to disturb its judgment here.

ARGUMENT

THE FCC REASONABLY CONCLUDED THAT BROADBAND INTERNET ACCESS SERVICE IS AN "INFORMATION SERVICE" THAT DOES NOT INCLUDE A "TELECOMMUNICATIONS SERVICE"

A. The 1996 Act defines an "information service" as "a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). Broadband Internet access service does precisely that. As the FCC explained, broadband Internet access provides end users "content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information." FCC Pet. App. 52a-53a (¶ 10) (footnotes omitted); *see id.* at 56a (¶ 11). Accordingly, as virtually no one disputed before the Commission, and as the court of appeals correctly recognized, *see id.* at 21a, the FCC properly categorized cable modem service—which is nothing more than a broadband Internet access service that happens to be provided over cable facilities—as an "information service" under the 1996 Act.

The more contentious question is whether, in addition to constituting an "information service," broadband Internet access service simultaneously qualifies as a "telecommunications service" under the Act. The 1996 Act defines "telecommunications" as pure transmission—*i.e.*, "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A "telecommunications service," in turn, is the offering of such pure transmission "for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." *Id.* § 153(46).

Taken together, these definitions are consistent with the traditional test for common carriage, which asks (1) whether the service permits transmission of "intelligence of [the customer's] own design and choosing," and (2) whether that transmission service is offered to all comers "indiscriminately." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) ("*NARUC II*") (internal quotation marks omitted); *see FCC v. Midwest Video Corp.*, 440 U.S. 689, 701 (1979) ("[a] common-carrier service in the communications context is one that 'makes a public offering to provide [communications facilities] whereby all members of the public who choose to . . . may communicate or transmit intelligence of their own design and choosing'") (footnote omitted; second alteration in original); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1480 (D.C. Cir. 1994). In fact, the FCC has held, and the D.C. Circuit has affirmed, that the "telecommunications service" definition under the 1996 Act is equivalent to the common-carriage test developed prior to the 1996 Act. *See, e.g.*, FCC Pet. App. 112a (¶ 55 n.205); Report and Order, *Federal-State Joint Board on Universal Service*, 12 FCC Rcd 8776, 9177-78, ¶ 785 (1997); *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926 (D.C. Cir. 1999). Accordingly, as the FCC explained in the order under review, *see* FCC Pet. App. 112a (¶ 55 & n.205)—and as the Ninth Circuit did not dispute—to include a discrete "telecommunications service," broadband Internet access service must include a common-carriage offering of transmission alone—*i.e.*, pure transmission offered on a standardized basis to all customers indiscriminately.

The FCC reasonably concluded that broadband Internet access provided over cable satisfies neither prong of the common-carrier test. *See id.* at 96a-97a, 112a-114a (¶¶ 40, 55). The broadband Internet access service that cable operators offer on a widespread basis is not pure transmission. Rather, it is "a single, integrated service" that "combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications." *Id.* at 91a (¶ 36). And, to the extent

cable operators do offer the transmission component of this service on a stand-alone basis (to ISPs), they plainly do not do so "indiscriminately" or on standardized terms. On the contrary, that transmission is offered as private carriage to a select group and only on terms that are *not* made available generally. *See id.* at 109a-111a (¶¶ 52-53). Therefore, no serious argument can be made that cable modem service providers are in fact operating today on a common-carrier basis. *See Midwest Video*, 440 U.S. at 701 ("A common carrier does not 'make individualized decisions, in particular cases, whether and on what terms to deal.'") (quoting *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 641 (D.C. Cir. 1976) ("*NARUC I*")); *NARUC II*, 533 F.2d at 608-09; *see also Southwestern Bell*, 19 F.3d at 1481 ("Whether an entity in a given case is to be considered a common carrier or a private carrier turns on the particular practice under surveillance.").[1]

B. The real question at issue here is not so much whether cable modem service providers *are* operating as communications common carriers today—such that their broadband Internet access service could be considered to contain a "telecommunications service"—but rather whether they *should be*

[1] In the court of appeals, several parties objected to the Commission's classification of pure transmission, in the relatively few circumstances where cable providers provide such transmission to unaffiliated ISPs, as private carriage. But, as a descriptive matter, that classification is clearly correct. To the extent cable operators have chosen to provide such transmission, the record established that they have done so on an individualized basis, "determin[ing] in each particular case 'whether and on what terms to serve.'" FCC Pet. App. 112a (¶ 55) (quoting *Southwestern Bell*, 19 F.3d at 1481). And, as a prescriptive matter, the Commission's approach is equally reasonable. It is well-established that, in the absence of a transmission bottleneck, there is no basis for the FCC to force carriers to provide stand-alone transmission indiscriminately on a standardized basis. *See, e.g.*, Memorandum Opinion and Order, *AT&T Submarine Systems, Inc.*, 13 FCC Rcd 21585, 21589-91, ¶¶ 9-11 (1998), *pet'n for review denied, Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 925-27 (D.C. Cir. 1999).

required to act as such. That is to say, the question is whether, unless the FCC exercises its forbearance authority under 47 U.S.C. § 160(a), the agency is required, under the statutory provisions in the Act, to force all broadband Internet access providers to strip-out a pure transmission service from their integrated broadband service offering and offer that transmission service separately to ISPs on a common-carrier basis, merely because the FCC, in the past, has forced DSL-based providers to do so under the *Computer Inquiry* rules.

The Ninth Circuit appears to have answered that question in the affirmative. In *City of Portland*, the court likened cable modem service to DSL-based Internet access, and its conclusion that the former includes a discrete "telecommunications service" was based in part on the fact that, under the FCC's rules, DSL providers were forced to offer a separate transmission service. *See* 216 F.3d at 877-78 (describing the "pipeline" portion of cable modem service as equivalent to telephone lines and characterizing the cable "pipeline" as "a telecommunications service as defined in the Communications Act"). Likewise, in his concurring opinion below, Judge Thomas, who authored *City of Portland*, emphasizes the FCC's historical treatment of DSL-based Internet access (as including both an "information service" and a "telecommunications service"), and he concludes that analogous treatment must apply to cable modem service providers. *See* FCC Pet. App. 31a-32a (asserting that the FCC's prior treatment of "Internet access via DSL . . . reflects a much more reasonable reading of the statute" than the one adopted in the *Declaratory Ruling*). Accordingly, as the Ninth Circuit appears to view the matter, because the FCC has, as an historical matter, forced telephone companies that provide DSL-based Internet access to create (and sell to unaffiliated ISPs) a discrete "telecommunications service" that underlies their Internet access offerings, the FCC must force cable modem providers to do the same.

In one sense, the Ninth Circuit's analysis is correct. As noted at the outset, it is a basic principle of federal telecom-

munications law that like services must be treated alike, and there is accordingly no basis in law or policy that would permit the Commission to exempt cable modem service from the requirement to provide a separate common-carrier transmission service to unaffiliated ISPs, even as it continues to apply such a requirement to DSL-based service provided by telephone companies. Indeed, such a regime would be particularly arbitrary in view of the fact that it is the cable modem providers that are the nation's leading broadband Internet access providers, with a market share of well over 50%, while DSL-based providers serve barely a third of the market.

The core point, however, is that the statute does not require the Commission to impose such a *Computer Inquiry*-like requirement on *any* broadband Internet access service, regardless of the platform used to provide that service. On the contrary, the *Computer Inquiry* rules are purely a creature of the FCC's making. As a result, as to *both* DSL-based and cable providers, the FCC retains the discretion to limit those rules or remove them altogether, consistent with principles of reasoned decisionmaking. *See, e.g., FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981). Indeed, at the same time as the FCC decided not to extend those rules to cable modem service providers (or, in the alternative, to waive them if they were otherwise deemed to apply), the FCC invited comment on whether to modify or eliminate them as to wireline providers such as SBC and BellSouth. *See Wireline Broadband NPRM*, 17 FCC Rcd at 3040, ¶ 43 (seeking comment on "whether the *Computer Inquiry* requirements should be modified or eliminated" with respect to DSL-based services).

In light of the highly competitive nature of the broadband market, moreover, it is clear that the *Computer Inquiry* rules have no place in broadband at all. As the FCC has explained, the *Computer Inquiry* proceeding was driven by the concern that "telephone companies [could] exercis[e] significant market power on a broad geographic basis" over the emerging market for enhanced services. *Computer II*, 77 F.C.C.2d at 468, ¶¶ 219-220. The resulting rules were therefore predicated on the existence of a "one-wire world"—*i.e.*, the

presence of a single bottleneck facility through which information services must pass. *See, e.g., California v. FCC*, 905 F.2d 1217, 1224 (9th Cir. 1990) ("*California I*") (FCC's rules reflect "concern[] that communications carriers would use their telephone exchange monopolies to obtain leverage in the competitive enhanced services market"); *California II*, 39 F.3d at 923-24 (FCC's rules were a response to the belief that "the telephone industry could use its monopoly of the [telephone] lines to prevent competition from developing in the enhanced services industry").

That predicate, however, is absent in broadband. As the FCC has found, while cable possesses the "most widely subscribed to technology" for broadband Internet access, it is facing increasing competition from multiple transmission platforms, including DSL, satellite, and fixed and mobile wireless. FCC Pet. App. 50a-52a (¶ 9); *see USTA v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (noting the "robust competition . . . in the broadband market"), *cert. denied*, 538 U.S. 940 (2003); *Fourth Report*, 19 FCC Rcd at 20552 ("[T]he competitive nature of the broadband market, including new entrants using new technologies, is driving broadband providers to offer increasingly faster service at the same or even lower retail prices."). "[T]he one-wire world" that led to the creation and refinement of the *Computer Inquiry* rules thus "appears to no longer be the norm in broadband services markets." *Wireline Broadband Non-Dominance NPRM*, 16 FCC Rcd at 22748, ¶ 5. There is accordingly no basis for forcing *any* broadband service provider to perform the "radical surgery" called for by the *Computer Inquiry* rules, regardless of the underlying platform used to provide service. And, in all events, the FCC plainly has the discretion to limit the application of those rules, provided it does so in a uniform and coherent manner that avoids favoring any particular technology.

C. To the extent the Ninth Circuit believed that the text of the 1996 Act forecloses the Commission from exercising such discretion, the court is incorrect. There is no provision in the statute that requires the FCC to mandate the "radical

surgery" necessary to extract a stand-alone "telecommunications service" from every broadband "information service," whether provided over wireline, cable, or another platform. In his concurring opinion, Judge Thomas did not cite any provision of the Act that by its terms imposes such a requirement, nor could he have. Nor do the statutory provisions that he does cite establish that Congress unambiguously intended to impose such an obligation, as required to come within the first step of *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

Thus, for example, Judge Thomas stresses that the statutory definition of "'information service'" refers to a "'capability'" (to, for example, send or receive e-mail or access content on-line), and he insists that actually putting "this *capability* into practice" requires "*actual transmission*" that takes broadband Internet access service "outside th[at] definition." FCC Pet. App. 29a-30a (quoting 47 U.S.C. § 153(20)). In fact, however, as the FCC has explained, the "information service" definition refers not just to a "capability," but rather to a "capability" that is provided "'via telecommunications.'" *Id.* at 95a-96a (¶ 39). Thus, if anything, the fact that broadband Internet access includes an "*actual transmission*" component—*i.e.*, that it is provided "via telecommunications"—only underscores the reasonableness of the Commission's conclusion that it is an "information service" alone. In any event, contrary to Judge Thomas's understanding, the fact that broadband Internet access service includes such transmission plainly does not foreclose that classification.

Judge Thomas also disputes the FCC's conclusion that the statutory definition of "telecommunications service" refers to a pure transmission offering that is provided "separately"—*i.e.*, on a stand-alone basis. *Id.* at 30a-31a; *see id.* at 96a (¶ 39) (FCC conclusion that the "telecommunications component" of cable modem service "is not . . . separable from the data-processing capabilities of the service" and is thus not a "telecommunications service"). According to Judge Thomas, "[n]othing in the definition suggests that the telecommunications component *must* be priced or offered separately

. . . to qualify as a telecommunications service." *Id.* at 31a (emphasis added). But that assertion not only ignores the settled principle that a service must be offered indiscriminately under the same terms and conditions to qualify as common carriage (and thus a "telecommunications service") under the Communications Act, *see supra* p. 11, but also misconceives the nature of judicial review under *Chevron*. To resolve the issues here on the basis of "pure statutory interpretation" as Judge Thomas purports to do, *see* FCC Pet. App. 25a-26a, it is not enough to question whether, to qualify as a "telecommunications service" under the statute, a transmission service "must" be offered on a stand-alone basis. Rather, the question is whether the expert FCC *may* reasonably construe the statute in that manner. So long as this is a reasonable interpretation of the statute, it is one to which the courts must defer. And Judge Thomas has cited nothing in the statute that precludes this FCC interpretation or renders it unreasonable.

Finally, Judge Thomas notes that the 1996 Act's "information service"/"telecommunications service" taxonomy "parallel[s]" the *Computer Inquiry*'s "basic service"/"enhanced service" definitional scheme, and he asserts that this parallel "creates a presumption" that Congress intended the *Computer Inquiry* rules to apply in the broadband context. *Id.* at 35a-36a (internal quotation marks omitted). But Congress's use (with some modification) of these *definitions* says nothing at all about whether it approved of the *rules* established in the *Computer Inquiry* regime, much less that it intended the FCC to apply those rules to broadband. If Congress had intended to impose some analogue of those rules as federal law and to mandate their extension to broadband, it could easily have said so. But, as discussed above, there is no language in the statute imposing such a scheme. Moreover, it would be particularly odd for Congress to have taken such a step given that both the Commission and the courts had, prior to the 1996 Act, stressed the flexibility of the *Computer Inquiry* regime and the FCC's authority to apply and alter that regime as circumstances dictate. *See, e.g.*, *Computer II*, 77 F.C.C.2d at 430, ¶ 120 ("[w]e are faced with the reality that technology and consumer demand have combined to . . . overrun the

definitions and regulatory scheme of the *First Computer Inquiry*"); *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 202-03 (D.C. Cir. 1982) (upholding FCC decision to detariff certain products previously covered by first *Computer Inquiry* order[2]); *California II*, 39 F.3d at 926-27. If Congress had intended to circumscribe the Commission's authority to adapt the *Computer Inquiry* framework as circumstances dictate, it would have done so directly and explicitly. As the 1996 Act's silence makes clear, it did not.[3]

In sum, the statute does not by its terms constrain the Commission's discretion to modify or eliminate the *Computer Inquiry* rules, nor does it require the Commission to apply those rules to broadband Internet access providers, including cable modem service providers. Rather, the statute gives the Commission the discretion to fashion a broadband regulatory framework that is appropriately suited to the competitive nature of the market. Provided the Commission exercises that discretion in a reasonable way—by, among other things, following through on its pledge to create a framework that is "consistent . . . across multiple platforms" and avoids

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[2] Final Decision and Order, *Regulatory and Policy Problems Presented by the Interdependence of Computer and Communication Services and Facilities*, 28 F.C.C.2d 267 (1971) ("*Computer I*").

[3] Judge Thomas also points to a 1995 Senate Report that states that, while the term "telecommunications service" does not include "information services," the "underlying transport and switching capabilities on which these interactive services are based . . . are included in the definition of 'telecommunications services.'" S. Rep. No. 104-23, at 18 (1995); *see* FCC Pet. App. 36a-37a (Thomas, J.). That report, however, referred to a definition of "telecommunications service" that included "the transmission . . . of information services." S. Rep. No. 104-23, at 79. And, importantly, that definition was never enacted into law. If anything, the report in question thus suggests that Congress did *not* intend the term "telecommunications service," as it was ultimately defined, to encompass "the transmission . . . of information services." *See INS v. Cardoza-Fonseca*, 480 U.S. 421, 442-43 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.") (internal quotation marks omitted).

"embed[ding] particular technologies," *Wireline Broadband NPRM*, 17 FCC Rcd at 3022, 3023, ¶¶ 4, 6—there will be no basis for objecting to its treatment of cable modem service as solely an "information service."

CONCLUSION

Considered in connection with the FCC's ongoing efforts to reform the regulatory framework for broadband Internet access, the *Declaratory Ruling* reflects a permissible exercise of the Commission's discretion. The judgment of the court of appeals to the contrary should be reversed.

Respectfully submitted,

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January 18, 2005

RESPONDENT'S BRIEF IN SUPPORT OF PETITIONER

(10) (10)

Nos. 04-277 & 04-281

2005

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

- and -

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF RESPONDENTS THE VERIZON TELEPHONE COMPANIES, GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS, and VERIZON INTERNET SERVICES INC. IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the statutory definitions contained in the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.*, prohibit the Federal Communications Commission from classifying broadband Internet access service as only an "information service," subject to minimal regulatory constraints, without a separately regulated "telecommunications service" component.

PARTIES TO THE PROCEEDING

Pursuant to Rule 24.2 of the Rules of this Court, Respondents adopt the list of parties to the proceeding in the court of appeals that is contained in the Brief of the Federal Communications Commission and the United States, with the exception of the "Verizon" respondents, which are identified below pursuant to Rule 29.6.

RULE 29.6 DISCLOSURE

Respondents the Verizon telephone companies, listed below, are wholly owned subsidiaries of Verizon Communications Inc.:

Contel of the South, Inc. d/b/a Verizon Mid-States
GTE Midwest Incorporated d/b/a Verizon Midwest
GTE Southwest Incorporated d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon New York Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington, DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

Respondent GTE.Net LLC d/b/a Verizon Internet Solutions is a wholly owned subsidiary of Verizon Technology Corp., which itself is an indirect wholly owned subsidiary of Verizon Communications Inc.

Respondent Verizon Internet Services Inc. is a wholly owned subsidiary of Bell Atlantic Entertainment and Information Services Group, Inc., which itself is an indirect wholly owned subsidiary of Verizon Communications Inc.

Verizon Communications Inc. is a publicly held corporation. Verizon Communications Inc. does not have a parent company, and no publicly held company has a ten-percent or greater interest in it.

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OPINION AND ORDER BELOW

Pursuant to Rule 24.2 of the Rules of this Court, Respondents the Verizon telephone companies, GTE.Net LLC d/b/a Verizon Internet Solutions, and Verizon Internet Services Inc. ("Verizon") adopt the statement regarding the opinion and order below that is contained in the Brief of the Federal Communications Commission ("FCC" or "Commission") and the United States of America.

JURISDICTION

Pursuant to Rule 24.2 of the Rules of this Court, Verizon adopts the statement of jurisdiction that is contained in the Brief of the FCC and the United States of America.

STATUTORY PROVISIONS INVOLVED

This case involves the following provisions of the Communications Act of 1934, as amended ("Communications Act" or "Act"): 47 U.S.C. §§ 153(20), 153(43), 153(46), 160(a), 230, 254, and 522. This case also involves Section 706 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 706 ("1996 Act"), 110 Stat. 153, *reprinted in* 47 U.S.C. § 157 note.

Sections 153(20), 153(43), 153(46), 160(a), 230, 254, and 522 of Title 47 of the U.S. Code are reprinted at FCC Pet. 208a-213a. Section 706 of the 1996 Act is reprinted at Resp. 18a-20a.[1]

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1. Citations to "FCC Pet." are to the Petition for a Writ of Certiorari filed by the FCC and the United States. Citations to "NCTA Pet." are to the Petition for a Writ of Certiorari filed by the National Cable & Telecommunications Association, *et al.* ("NCTA"). Citations (Cont'd)

STATEMENT OF THE CASE

I. Legal and Factual Background

A. The National Policy of Promoting Broadband Investment and Deployment

This case involves the proper statutory classification and regulatory treatment of broadband (or "high-speed") Internet access services. Broadband allows the retrieval of information from the Internet in "real-time" and the reception of high-quality graphics, pictures, audio, and video through the Internet, at speeds up to twenty times faster than traditional narrowband (or "dial-up") connections. *See* FCC Pet. 52a-54a.

Numerous competitors using different transmission technologies currently offer broadband Internet access service, and the FCC repeatedly has found that the broadband market is developing on a competitive basis and that the preconditions for monopoly are absent.[2] Broadband service offered over cable networks is referred to as "cable modem service." FCC Pet.

(Cont'd)
to "Resp." are to Verizon's response in support of certiorari. For the convenience of the Court, Verizon's response in support of certiorari included a supplemental appendix containing the Ninth Circuit's decision in *AT&T Corp. v. City of Portland*, 216 F.3d 871 (9th Cir. 2000), in addition to Section 706 of the 1996 Act, *see* Sup. Ct. R. 14.1(*i*)(ii), 14.1(f).

2. *E.g.*, *Rulemaking to Amend Parts 1, 2, 21, & 25*, 15 F.C.C.R. 11,857, 11,865 (2000); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable & Timely Fashion*, 14 F.C.C.R. 2398, 2423-24 (1999) ("*First Section 706 Report*").

49a-50a. The first generation of broadband services offered by telephone (or "wireline") companies, including Verizon, are called digital subscriber line ("DSL"). Verizon has recently started to deploy fiber-to-the-premises ("FTTP") – the next generation of telephone company-provided broadband services. Verizon's FTTP network will allow data speeds ten times faster than cable modem or DSL, will include a separate path for video, and will be more reliable than today's copper-based technologies. In addition to cable and telephone companies, satellite operators, fixed and mobile wireless companies, and electric utilities offer broadband services. *See, e.g.*, *Availability of Advanced Telecomms. Capability in the United States*, FCC 04-208, 2004 FCC LEXIS 5157, at *2, *12, *13-*44 (Sept. 9, 2004) ("*Fourth Section 706 Report*").

The economic and social benefits of the widespread deployment of broadband capabilities are well documented. Broadband allows businesses to increase efficiency and productivity, resulting in substantial economic and job growth. *See* FCC Pet. 4. Broadband also fuels the development of new and innovative services, including Internet-delivered video, audio, and voice communications. For example, broadband connections have made possible new voice-over-Internet-protocol ("VOIP") services, which compete with traditional telephone services. *Fourth Section 706 Report*, 2004 FCC LEXIS 5157, at *44-*45. And next-generation networks, including the FTTP network that Verizon is currently deploying, will deliver not only voice and data services, but also video programming, providing consumers with a competitive alternative to cable and satellite systems.

To make the promise of broadband widely available, broadband providers, including both cable operators and

telephone companies, have spent billions of dollars upgrading their existing infrastructure and building new facilities. The United States, however, still lags behind other nations in broadband penetration, currently ranking thirteenth. *See* Anne Veigle, *Supreme Court to Hear Brand X Cable Modem Case*, Communications Daily, Dec. 6, 2004, at 1. Because "the infrastructure of today may be insufficient to support the applications of tomorrow," significant additional capital investment is needed to ensure widespread deployment of this critical new technology. *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3022 (2002) ("*Wireline Broadband NPRM*").

Congress has made clear that encouraging broadband investment and deployment is among the nation's central communications policy goals. In the 1996 Act, Congress sought to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services." S. CONF. REP. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. CONF. REP. No. 104-458, at 1 (1996) (Joint Explanatory Statement). Thus, by statute it is "the policy of the United States ... to promote the continued development of the Internet and other interactive computer services and other interactive media." 47 U.S.C. § 230(b)(1). Congress further directed the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other things, taking "measures that promote competition," and employing other "methods that remove barriers to infrastructure investment." 1996 Act, § 706(a)-(b). Consistent with these statutory commands, the FCC has found that "[t]he widespread

deployment of broadband infrastructure has become the central communications policy objective of the day." *Wireline Broadband NPRM*, 17 F.C.C.R. at 3020-21 (footnote omitted).[3]

B. The Communications Act's Distinct Service Definitions

Three statutory definitions are relevant to this case, each of which was added to the Communications Act by the 1996 Act: (1) "telecommunications," (2) "telecommunications service," and (3) "information service." *See* 47 U.S.C. §§ 153(43), 153(46), 153(20). The central question in this case is whether cable modem service offered to retail subscribers is appropriately classified as an "information service" that uses "telecommunications" to perform the transmission function as the FCC found, *see* FCC Pet. 88a-116a, or whether the statutory definitions in the Act require the FCC to find a separate "telecommunications service" offering inside every broadband Internet access service as the Ninth Circuit directed, *id.* at 21a-22a.

The initial statutory classification of any service under the Communications Act determines the regulatory regime that will apply. *See id.* at 189a (Chairman Michael K. Powell, stating that Congress "has defined ... rights and obligations differently, depending on the nature of the service offered without regard to the means in which it is offered"); *cf. Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 355-56

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3. *See Amendment of Part 15 Regarding New Requirements & Measurement Guidelines for Access Broadband Over Power Line Sys.*, FCC 04-245, 2004 FCC LEXIS 6134, at *16-*17 (Oct. 28, 2004); *IP-Enabled Servs.*, 19 F.C.C.R. 4863, 4865 (2004) ("*VOIP NPRM*").

(2002) (Thomas, J., concurring in part and dissenting in part). The classification of a transmission service as a "telecommunications service" means that the service is, absent an express act of waiver or forbearance, subject to common carrier treatment and regulation under Title II of the Communications Act. This includes regulatory mandates such as price controls through tariffing, service regulation, access rules, and a requirement to provide service indiscriminately to all customers. FCC Pet. 6, 9a. By contrast, information services are largely unregulated and may be offered on an integrated basis to both retail and wholesale customers on market-based terms. *See id.* at 7, 9a; NCTA Pet. 4.

The broadest of the statutory terms at issue here is "telecommunications," which is defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). This definition encompasses any "pure transmission" function, including those used in the delivery of other defined services under the Act. Well before the passage of the 1996 Act, both the FCC and the federal courts had recognized that many "pure transmission" functions should not be subject to common carrier regulation. *See, e.g., Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 645 (D.C. Cir. 1976) ("*NARUC I*") (upholding Commission decision to treat certain commercial mobile services as non-common carrier telecommunications); *see also infra* n.9.

The second statutory classification is a subset of the first. A "telecommunications service" is defined as "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to

the public, regardless of the facilities used." 47 U.S.C. § 153(46). Both the FCC and the federal courts have construed the definition of "telecommunications service" to be synonymous with the concept of "common carriage" as developed and applied prior to the enactment of the 1996 Act. *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 926-27 (D.C. Cir. 1999); *Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8521-22 (1997). The legislative history of the 1996 Act confirms that the definition of "telecommunications service" "recognize[s] the distinction between common carrier offerings . . . and private services." H.R. CONF. REP. NO. 104-458, at 115 (1996).

The *sine qua non* of a common carrier service is the undertaking to serve all customers indiscriminately, whereas a non-common carrier (or "private carrier") reserves the right to refuse service or to provide service on individualized and distinct terms and conditions. *Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("*NARUC II*"); *NARUC I*, 525 F.2d at 642. A given service provider may be a common carrier with respect to some services but a private carrier with respect to others. *See S.W. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994); *NARUC II*, 533 F.2d at 608. The "common carriage" undertaking for a particular service may be voluntary or, in certain limited circumstances, it may be imposed by regulation. Historically, absent a voluntary undertaking to provide a service on a common carrier basis, such duties have been imposed only where substantial market power necessitates regulation. *See, e.g., Virgin Islands Tel.*, 198 F.3d at 925-27.

Finally, the Act defines an "information service" as the "offering of a capability for generating, acquiring, storing,

transforming, processing, retrieving, utilizing, or making available information." 47 U.S.C. § 153(20). Services falling within this definition must still be delivered to end-users through some form of transmission. The definition therefore recognizes that "information services" are made available "via telecommunications." *Id.* By using the broader term "telecommunications," rather than the narrower term "telecommunications service," the statute expressly recognizes that an entity offering "information services" is not necessarily *providing* a separate "telecommunications service" to its retail subscribers; rather it is *using* "telecommunications" as part of a larger service offering. *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 7 (D.C. Cir. 2000); *see Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,521 (1998). Accordingly, the transmission component of an information service may be either a common carrier or a non-common carrier offering.

This too is consistent with pre-1996 Act precedent, which asks whether a carrier possesses market power before compelling it to offer service on a common carrier basis. Since the late 1970's, the FCC's so-called "*Computer Rules*" have required certain telephone companies to separate out and provide indiscriminate access to the transmission component of their information service offerings and to "unbundle" the various elements of the transmission component on request. *See Amendment of Section 64.702 of the Comm'n's Rules and Regulations*, 77 F.C.C.2d 384, 474-75 (1980) ("*Computer II*") (subsequent history omitted). In adopting the *Computer Rules*, the Commission found that certain carriers had "bottleneck" control over transmission facilities under the conditions that prevailed in the narrowband market of the 1970's and 1980's. Based upon that finding, the FCC imposed the full panoply of common carrier obligations only upon a limited class of providers. FCC Pet. 89a-90a n.139. In contrast, the FCC found

that carriers that had no control over bottleneck local facilities, and therefore "d[id] not have . . . market power," could not act anticompetitively and therefore need not be subject to the *Computer Rules*. *Computer II*, 77 F.C.C.2d at 468-69.

C. The Commission's Treatment of Broadband Internet Access Services Prior to its Issuance of the Declaratory Ruling

During the early stages of the broadband market's development, the FCC declined to classify or to regulate cable modem service. *See Gulf Power*, 534 U.S. at 352-56 (Thomas, J., concurring in part and dissenting in part) (describing the FCC's "agnosticism" on the statutory classification question). Thus, cable operators were left free from any regulation, let alone restrictive common carrier rules, in their deployment and provision of broadband service.

On the other hand, during that same time period, the Commission simply assumed that any service offered by a telephone company was a "telecommunications service" and reflexively imposed the legacy common carrier obligations applicable to voice telephony on the transmission component of DSL service. *See Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,029-30 (1998) (subsequent history omitted); *GTE Tel. Operating Cos.*, 13 F.C.C.R. 22,466, 22,483 (1998). It did so mechanistically, in cursory proceedings, based only on the identity of the provider. Indeed, the extension of common carrier treatment to DSL was not supported by any analysis at all – let alone a careful examination of the relevant statutory definitions, market conditions, incentives to make capital investments and deploy facilities, and relative costs and benefits of common carrier regulation.

At least in part because of its substantial regulatory advantage, cable modem service grew to become the clear leader in the broadband market. For the last several years, cable has consistently maintained a broadband market share of fifty-eight to sixty-five percent. FCC, Indus. Analysis & Tech. Div., *High-Speed Servs. for Internet Access: Status as of Dec. 31, 2003*, at 6 (Table 1) (June 2004), *at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0604.pdf; *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 19 F.C.C.R. 1606, 1643 (2004). Recent industry analysis indicates that cable is exhibiting its "best performance in nearly two years" and currently has a 62.3% share of the broadband market. Michael Harris, *Cable Turns the Table on DSL in Third Quarter, North American MSOs Recapture Broadband Market Momentum*, Cable Datacom News (Dec. 1, 2004), *at* http://www.cabledatacomnews.com/dec04/dec04-1.html.

While cable modem service is undoubtedly the market leader, the FCC has repeatedly found that competition in the broadband market is extensive and growing. *See, e.g., Fourth Section 706 Report*, 2004 FCC LEXIS 5157, at *2, *12, *13-*44; *Wireline Broadband NPRM*, 17 F.C.C.R. at 3022. The federal courts, too, have confirmed that "robust competition" exists in the "broadband market." *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) ("*USTA I*"), *cert. denied*, 538 U.S. 940 (2003); *see United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir.) ("*USTA II*"), *cert. denied*, 125 S. Ct. 313 (2004). Although the current broadband market is vibrantly competitive, the Commission has reaffirmed the need to encourage additional investment in and deployment of broadband technologies through a uniform national broadband policy. *See, e.g., Wireline Broadband NPRM*, 17 F.C.C.R. at 3023.

In apparent recognition of the need to address both the anomalous regulatory asymmetry in its current regulatory treatment of competing broadband services and its statutory obligation to remove barriers to investment in broadband technologies, the FCC has commenced, but not completed, several proceedings to determine the appropriate regulatory framework that will apply to telephone company-provided broadband services. *See generally Wireline Broadband NPRM*, 17 F.C.C.R. 3019; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 F.C.C.R. 22,745 (2001) ("*ILEC Broadband NPRM*").[4] Through those proceedings and the further notice of proposed rulemaking appended to the order under review, the Commission has expressed its desire to develop a "rational framework for the regulation of competing services that are provided via different technologies and network architectures," FCC Pet. 48a, and to ensure that all "broadband services . . . exist in a minimal regulatory environment" that will "promot[e] investment and innovation in a competitive market," *id.* at 47a; *see Wireline Broadband NPRM*, 17 F.C.C.R. at 3022-23. As discussed below, the Ninth Circuit's ruling presents an obstacle to the Commission's ability to achieve these goals – despite the fact that they are embodied in statutory commands contained in the 1996 Act itself.

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4. Both of these proceedings have been open for almost *three years* without decision at the time of submission of this brief.

II. The Proceedings Below

A. The FCC's Declaratory Ruling

In 2000, the FCC took the first step toward "develop[ing] a national legal and policy framework" for broadband services by releasing a Notice of Inquiry. *Inquiry Concerning High-Speed Access to the Internet Over Cable & Other Facilities*, 15 F.C.C.R. 19,287, 19,288 (2000) ("*Notice of Inquiry*"). Specifically, the Commission requested comments regarding, among other things, the interrelationship of the statutory classification of cable modem service and other broadband technologies, including DSL. *Id.* at 19,293.

After reviewing a comprehensive record containing hundreds of submissions from interested parties, and following a detailed examination of the Communications Act and relevant precedent, the FCC issued the *Declaratory Ruling* at issue in this case. *See* FCC Pet. 40a-181a. The *Declaratory Ruling* marked the first time that the Commission conducted a thorough analysis of the nature of broadband Internet access, the prevailing market conditions, and the regulatory framework that would best advance the twin goals of encouraging capital investment and intermodal competition. *See id.*; *see also Gulf Power*, 534 U.S. at 352-56 (Thomas, J., concurring in part and dissenting in part). The Commission made three critical-findings with respect to the proper statutory classification and regulatory treatment of cable modem service.

First, the FCC found that, in light of its consistent conclusion that the broadband market constitutes a separate and vibrantly competitive product market, there is no basis for compelling cable operators to carve out the transmission component that underlies cable modem service and offer it on a common carrier basis. FCC Pet. 98a-102a. Thus, the

Commission classified the combined Internet access service offering of cable operators as an "information service," *id.* at 88a-98a, and the underlying transmission component of that service as a non-common carrier form of private "telecommunications" under the Act, *id.* at 100a-102a.

Second, the FCC waived on its own motion any application of the *Computer Rules* to cable modem service. Application of those rules would have required cable modem providers to separate the transmission component of cable modem service from its content component and offer the former on a common carrier basis to any requesting party. *Id.* at 102a-104a. The Commission determined that a waiver was appropriate because applying the *Computer Rules* would "disserve the goal of Section 706 [of the 1996 Act] that 'we encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans ... by utilizing ... measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.'" *Id.* at 104a (citation omitted).

Third, the FCC found that where cable operators might be offering broadband transmission service separately to Internet service providers, there was no reason to compel the offering of such service on a common carrier basis. *See id.* at 109a-114a. Thus, the Commission stated that it would allow cable operators to continue to provide transmission service on a non-common carrier basis, *i.e.*, as "private carriage" (that is, as a form of "telecommunications" but *not* "telecommunications service"). *See id.* at 112a-114a.[5]

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5. The Commission also tentatively concluded that, even if common carrier requirements might be deemed to apply to cable modem service, the FCC likely would forbear from applying those

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B. The Ninth Circuit's *Per Curiam* Opinion

Seven different petitions for review of the FCC's *Declaratory Ruling* were filed in various courts of appeal and consolidated pursuant to lottery in the Ninth Circuit. *Id.* at 10a. Verizon's position was unique among the petitioners.

Verizon, which offers DSL in direct competition with cable modem service, argued that the Commission correctly concluded that cable modem service is an "information service" and that nothing in the Communications Act requires the FCC to strip out any portion of cable modem service or impose common carrier regulations upon it. *See id.* at 10a-11a. At the same time, Verizon maintained that the FCC had a constitutional and statutory obligation to arrive at a rational and competitively neutral regulatory regime for *all broadband services*, regardless of the corporate identity of the provider or the technology employed. *See id.* This was particularly so given the FCC's reliance on competition from DSL in the *Declaratory Ruling* to relieve market-leading cable modem providers of a host of regulatory requirements that the FCC had applied to telephone company-provided broadband services. *See id.* Verizon asked the court of appeals to affirm the FCC's analysis of the proper statutory classification of cable modem service and its reading of the statutory definitions of the Act, but to remand to the agency to address the inconsistency between the reasoning contained in the *Declaratory Ruling* and the present statutory treatment of DSL.

(Cont'd)
regulations to cable companies "because cable modem service is still in its early stages; supply and demand are still evolving; and several rival networks providing residential high-speed Internet access are still developing." *Id.* at 153a.

Other petitioners argued that *all* broadband Internet access services must be treated as common carrier services. *See id.* at 10a. Relying on the statutory definition of "telecommunication services," these petitioners argued that the statutory definitions added by the 1996 Act require the Commission to initially classify the transmission component of both cable modem and DSL as a common carrier service. These petitioners relied heavily upon the FCC's present regulatory treatment of DSL, arguing in essence that Congress had codified that regime and extended it to all broadband Internet access services.

The Ninth Circuit, in a *per curiam* decision, vacated the FCC's determination that cable modem service is an "information service" that does not include a separately regulated "telecommunications service." *Id.* at 21a-22a. The panel did so not because it disagreed with the Commission's statutory analysis, but because it concluded that it was bound by a prior Ninth Circuit panel decision pre-dating any formal FCC decision on the subject. *Id.* at 12a-22a. In that case, *AT&T Corp. v. City of Portland*, a different panel of the Ninth Circuit had held that because cable modem service sold to end users is provided via a transmission component – "telecommunications" under the Communications Act – and because cable modem service is offered to the public, cable modem service *ipso facto* contains a separate "telecommunications service." *See* Resp. 11a-12a, 15a-17a. Thus, the *Portland* panel declared that cable modem service must, absent the grant of a waiver or a forbearance decision by the FCC, be subjected to the full panoply of common carrier obligations that apply to such services under Title II of the Communications Act. *See id.*

The *Brand X* panel's complete reliance on *Portland* was curious, given the circumstances of the latter decision. The *Portland* panel did not examine the statutory interrelationship

among "telecommunications," "telecommunications services," and "information services." Nor did it consider the proper market definition, the presence of intense competition in the broadband market, or the decades of Commission and judicial precedent making clear that common carrier duties cannot be imposed unless the public interest requires them due to lack of competition. In addition, the *Portland* panel relied heavily on the Commission's treatment of DSL in reaching its decision. *See id.* at 16a (noting that "the FCC regulates DSL service ... as an advanced telecommunications service subject to common carrier obligations"). Finally, the *Portland* panel acknowledged that the FCC had yet to speak to the statutory classification issue and had open administrative proceedings in which it intended to do so. *See id.* at 8a, 17a.

Moreover, the *Portland* panel conceded that "courts are ill-suited to fix [the] flow" of the Internet, and that the "quicksilver technological environment" in which broadband services exist would render it an "idle exercise" for a court even to attempt to establish a national policy on this subject. *Id.* at 8a. It also expressed its intention "*not [to]* impinge on [the FCC's] authority over these matters." *Id.* at 17a (emphasis added). Notwithstanding these statements, the panel in *Brand X* did just that, by elevating the *Portland* ruling over a contrary intervening decision by the agency charged by Congress with interpretation and enforcement of the Communications Act. FCC Pet. at 12a-22a.[6]

6. Although adopting the *Portland* panel's conclusion that the transmission component of cable modem service is a "telecommunications service," the *Brand X* panel expressly left intact the FCC's determination that transmission services could be offered on a "private carriage" basis to Internet service providers, and did (Cont'd)

The *Brand X* panel also extended the *Portland* panel's rote reliance on the Commission's prior treatment of DSL. Indeed, the concurring opinion of Judge Thomas in *Brand X* (the author of the *Portland* decision) makes clear that the FCC's treatment of DSL was integral to the *Brand X* decision. *See id.* at 31a-32a (Thomas, J., concurring) (explaining prior FCC treatment of "Internet access via DSL" and concluding that the FCC's approach to DSL "reflects a much more reasonable reading of the statute").

Because it held that *Portland* was dispositive, the *Brand X* panel completely ignored the Commission's findings regarding the competitive state of the broadband market and the lack of any public interest justification for common carrier regulation. Nor did the *Brand X* panel consider the fact that the FCC's early decisions applying common carrier treatment to the transmission component of DSL services contained no statutory analysis and were under reconsideration at the agency in light of the very factors that had compelled the FCC's conclusions regarding the proper classification of cable modem service. Because the *Brand X* panel vacated the FCC's ruling that cable modem service was *not* subject to common carrier treatment, it declined to address Verizon's arguments that the First Amendment, principles of competitive neutrality contained in the Communications Act, and principles of reasoned decisionmaking required the FCC to classify competing broadband services, such as DSL, in the same manner. *Id.* at 22a n.14.

(Cont'd)
not purport to disturb the Commission's decision to waive the application of the *Computer Rules* to cable modem service or the FCC's power to forbear from applying common carrier requirements in its ongoing rulemaking. *See id.* at 22a n.14; *see also id.* at 34a-35a (Thomas, J., concurring).

SUMMARY OF ARGUMENT

The Ninth Circuit's reasoning in *Portland*, and the perpetuation of that reasoning in *Brand X*, fundamentally misapplied the definitions contained in the Communications Act. The statutory definition of an "information service" states that the service is offered "via telecommunications," 47 U.S.C. § 153(20), making clear that the transmission component of an information service cannot be classified as a "telecommunications service" simply because the integrated package is offered to the public. Similarly, Section 706(c) of the 1996 Act speaks of "advanced telecommunications capability" and "broadband telecommunications capability" without reference to the distinct and narrower category of "telecommunications services." Principles of statutory construction and the legislative history confirm Congress's intent to maintain the distinction between common carriage and non-common carriage or "private" telecommunications that was well-established prior to enactment of the 1996 Act.

Common carrier status has always been a function of either a voluntary decision to make an indiscriminate offering to the public or the imposition of common carrier duties based on perceived market power over transmission facilities that are essential to reach end-users. Nothing in the statutory definition of "telecommunications service" adopted by the 1996 Act was meant to alter this well-established two-pronged test for imposing common carrier duties or to compel the Commission to extend common carrier regulation beyond its roots in mitigating the effects of so-called natural monopolies. Given the deregulatory purpose of the 1996 Act in general, and its focus on encouraging investment in and deployment of broadband technologies in particular, the idea that Congress used the statutory definition of

"telecommunications service" to codify common carrier treatment for the transmission component of every new information service cannot be sustained.

The Ninth Circuit's reliance on the prior regulatory treatment of DSL is fundamentally misplaced. The transmission component of DSL was labeled a "telecommunications service" in cursory proceedings without any analysis of the statutory terms, applicable agency or court precedent, or competitive conditions in the broadband market. As the *Declaratory Ruling* implicitly recognizes, common carrier treatment of *any* broadband provider cannot be justified under prevailing market conditions. Unlike the narrowband transmission world of the 1970's and 1980's, there is no dominant broadband provider today. To the contrary, the market is characterized by vigorous competition across various delivery platforms. By holding that the Communications Act requires the transmission component of cable modem service (as well as the offerings of newer entrants such as satellite, fixed wireless and electric utilities) to be initially classified as a "telecommunications service" subject to common carrier regulation, the Ninth Circuit injected significant uncertainty with respect to the proper classification of *all* broadband services. Its decision undermines investment incentives and discourages innovation in this burgeoning market in contravention of clearly expressed national policy and impedes the Commission's efforts to establish a coherent national regulatory regime for all broadband providers consistent with Congress's vision in the 1996 Act.

Present market conditions, FCC and judicial precedent interpreting the Communications Act, and this Court's own First Amendment jurisprudence render unlawful mandatory

common carrier treatment of cable modem, DSL, or any other broadband service. This Court should reverse the decision below and hold that the FCC has statutory authority to classify all forms of broadband Internet access as "information services" subject to minimal regulation. The Court should further direct that the Ninth Circuit remand this case directly to the FCC, with instructions to expeditiously arrive at a coherent statutory classification for all broadband services, in light of this Court's opinion, that is consistent with the Communications Act's statutory requirements of competitive and technological neutrality.

ARGUMENT

I. The Court Below Misapplied the Relevant Definitions in the Communications Act and Ignored Decades of FCC and Judicial Precedent.

The *Brand X* panel's conclusion (based on the earlier *Portland* decision) that the transmission component of cable modem service sold to end users must be classified as a "telecommunications service" cannot be reconciled with the statutory definitions at issue.[7] In *Portland*, the Ninth Circuit

7. Whatever the validity of the *Brand X* panel's determination that it was bound by *Portland*, *see* FCC Pet. 11a-21a, this Court obviously is not so bound, and may review the FCC's decision under the familiar two-step framework set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Indeed, in *Chevron* itself this Court reversed the decision of a court of appeals despite the fact that the court of appeals had followed its own precedent in setting aside the agency decision at issue. *Id.* at 841-45; *see also, e.g., Muhammed v. Close*, 540 U.S. 749, 124 S. Ct. 1303, 1306 (2004) (*per curiam*) (criticizing court of appeals for "following the mistaken view expressed in [c]ircuit precedent").

reasoned that "Internet access for most users consists of two separate services." Resp. 11a. In the Ninth Circuit's view, the transmission part of the service, which "link[s] the user and the ISP, is classic 'telecommunications'" under the Communications Act. *Id.* As far as this part of the *Portland* panel's decision goes, it is correct – the transmission service that underlies Internet access service *does* fit squarely within the statutory definition of "telecommunications." 47 U.S.C. § 153(43).

But the *Portland* panel went further, concluding that because Internet access service includes "telecommunications," a cable company "provid[ing]" Internet access service to the public offers "telecommunications services," and thus is a "telecommunications carrier" subject to common carrier regulation unless the FCC waives or forbears from such regulation. Resp. 11a; *see id.* at 12a ("to the extent that [a cable modem service provider] provides its subscribers Internet transmission over its cable broadband facilities, it is providing a telecommunications *service* as defined in the Communications Act" (emphasis added)).

1. In reaching its conclusion, the *Portland* panel completely overlooked the fact that the Communications Act recognizes *two* categories of transmission services: (1) a broader category of "telecommunications," 47 U.S.C. § 153(43), which may be offered on a non-common carrier (or "private carriage") *or* a common carrier basis, and (2) the subset of "telecommunications" – "telecommunications services" – which are offered *only* on common carrier terms, *see id.* §§ 153(46), 153(44). Information services, by definition, are made available "via telecommunications," *id.* § 153(20), but that does not automatically render any portion of them separate "telecommunications services" with all the regulatory obligations that such a classification triggers. Rather than

"chart[ing] a course by the law's words" as it professed to do, Resp. 8a, the Ninth Circuit in *Portland ignored* the language of the statute and conflated the narrower statutory definition of "telecommunications services" with the broader definition of "telecommunications" to reach a conclusion that cannot be squared with the plain language of the Communications Act, *see id.* at 11a-12a, 15a-17a.[8]

If the Ninth Circuit were correct that cable modem service includes a separate "telecommunications service" simply because it includes a transmission function that is ultimately offered "to the public," *see* Resp. 11a, then there would have been no reason for Congress to have included a separate definition of "telecommunications" in the Communications Act or to have specified that "information services" are made available "via telecommunications." *See, e.g., United States v. Bean*, 537 U.S. 71, 75 n.4 (2002) ("'The use of different words within related statutes generally implies that different meanings were intended.'" (quoting 2A NORMAN SINGER, SUTHERLAND ON STATUTES AND STATUTORY CONSTRUCTION § 46.06, p. 194 (6th ed. 2000))). Most communications services include a "pure transmission" element, but that does not mean that this element is treated as a separate "telecommunications service" just because it is a part of a larger service package offered to the public. Thus, the Ninth Circuit's reading of the statutory definitions at issue

8. Judge Thomas's concurring opinion in *Brand X* illuminates the *Portland* panel's error in statutory construction. He criticizes the FCC for placing a "great deal of weight on the distinction" between "telecommunications" and "telecommunications service." FCC Pet. 30a (Thomas, J., concurring). The *Portland* and *Brand X* rulings obliterate the statutory distinction, contrary to *both* traditional principles of statutory construction and the expert agency's own interpretation of the statute.

in this case is wrong under any standard, whether it be a traditional judicial statutory construction inquiry or the more specialized analysis of the two-part test under *Chevron*. *Cf. Gulf Power*, 534 U.S. at 337-39.

2. The Ninth Circuit's decision that cable modem service includes a separate "telecommunications service" just because it includes a "transmission" component also conflicts with a substantial body of judicial and FCC precedent, much of which pre-dates the passage of the 1996 Act. When Congress enacts a statute against the background of settled judicial and administrative interpretations, there is a presumption that Congress was aware of the earlier interpretations and, in effect, adopted them. *See Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts.").

Specifically, in the absence of a voluntary undertaking to offer the transmission component of a service on common carrier terms, the decision to impose common carrier treatment depends on whether "the public interest ... require[s] the carrier to be legally compelled to serve the public indifferently" because the carrier "has sufficient market power." *AT&T Submarine Sys., Inc.*, 13 F.C.C.R. 21,585, 21,588-89 (1998); *see Virgin Islands Tel.*, 198 F.3d at 924-25; *S.W. Bell Tel.*, 19 F.3d at 1481, 1484; *NARUC I*, 525 F.2d at 642; *Cable & Wireless*, 12 F.C.C.R. at 8521-22. Absent a unilateral decision to serve all customers indifferently, classification of a service as a "telecommunications service" – and imposition of attendant common carrier obligations – must be based upon a finding of market power. *See, e.g., AT&T Submarine Sys.*, 13 F.C.C.R. at 21,589; *see also Implementation of the Non-Accounting Safeguards of Sections*

271 & 272 of the Communications Act of 1934, as amended, 11 F.C.C.R. 21,905, 21,957 (1996) (subsequent history omitted) (declining to impose Title II regulation because the relevant market was "highly competitive"); *Procedures for Implementing the Detariffing of Customer Premises Equip. & Enhanced Servs.*, 95 F.C.C.2d 1276, 1301 (1983) (subsequent history omitted) ("[T]he advent and growth of competition in a particular market eliminates the need for continued regulation.").[9]

Both FCC and judicial precedent pre-dating the 1996 Act similarly make clear that the question whether the underlying transmission component of an integrated service offering must be stripped out and offered subject to the full panoply of obligations that apply under the FCC's *Computer Rules* depends upon the competitive state of the market. Those rules mandate that a carrier offer the transmission

9. Indeed, the Commission has long refused to impose common carrier duties on "pure transmission" functions in competitive markets, even where the transmission service is offered on a "stand-alone" basis. *See, e.g., Licensing Under Title III of the Communications Act of 1934, as amended*, 8 F.C.C.R. 1387, 1388-91 (1993) (declining to impose common carrier duties on satellite services because carrier did not have "sufficient market power"); *Cox Cable Communications, Inc.*, 102 F.C.C.2d 110, 121-22 (1985), *vacated on other grounds*, 1 F.C.C.R. 561 (1986) (declining to impose common carrier duties on a carrier that "ha[d] little or no market power" and where "[t]here [we]re alternative methods of providing similar service"); *accord Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 207, 208 (D.C. Cir. 1982) (upholding Title I classification of enhanced services and customer premises equipment ("CPE") because "the market for enhanced services is 'truly competitive'" and "charges for CPE provided by carriers need no longer be regulated . . . because of the competitive market conditions now prevailing").

component – and, if requested to do so, offer individual elements of the transmission component – separately on common carrier terms. From the outset, the premise for the *Computer Rules* was that certain carriers possessed market power in the narrowband market, and the FCC declined to extend the rules to carriers where they "d[id] not have market power" and thus would not be in a position to act anticompetitively. *Computer II*, 77 F.C.C.2d at 468-69; *see, e.g., id.* at 428-30 (finding that it would not serve the public interest to subject enhanced service providers to traditional common carrier regulation because, among other things, the market was "truly competitive").

As the FCC put it in the *Declaratory Ruling*, requiring carriers to separate transmission facilities from the content they were designed to deliver is a form of "radical surgery," FCC Pet. 101a, which is justified only in the face of market failure and a substantial threat of anticompetitive behavior.[10] Congress was presumptively aware of the longstanding distinction between common carriage and private carriage and the traditional criteria applied to separate one from the other. Yet, not a word in the statutory definitions themselves, nor the purpose or legislative history of the 1996 Act, supports the proposition that the statutory definition of "telecommunications services" was meant to work a radical change in the law regarding common carrier status. Such a dramatic change in regulatory course (and repudiation of prior agency and judicial precedent) is hardly the stuff of *sub silentio* congressional action through adoption of a general definitional section in a statute.

10. Ironically, in reviewing the FCC's *Computer Rules*, the Ninth Circuit itself recognized that common carrier regulation is unjustified in competitive markets. *See California v. FCC*, 39 F.3d 919, 923-24 (9th Cir. 1994); *California v. FCC*, 905 F.2d 1217, 1224 (1990), *vacated in part on other grounds*, 39 F.3d 919 (9th Cir. 1994).

The Ninth Circuit nonetheless made common carriage treatment the rule rather than the exception. It completely ignored the statutory predicate for imposition of government access and price regulation: the existence of some form of market power. By contrast, the Commission was on solid statutory ground in finding that the competitive nature of the broadband market eliminated any public interest justification for the application of common carrier duties to the transmission component of cable modem service. The broadband Internet access market is vibrantly competitive and is only growing more so with each passing day. *See, e.g.*, *USTA II*, 359 F.3d at 585; *USTA I*, 290 F.3d at 428. The Commission long ago confirmed that "no group of firms or technology will likely be able to dominate the provision of broadband services," *Rulemaking to Amend Parts 1, 2, 21, & 25*, 15 F.C.C.R. at 11,865, and that "the preconditions for monopoly appear absent" in the broadband market, *First Section 706 Report*, 14 F.C.C.R. at 2423-24. Accordingly, the Commission's decision not to separate out and impose common carrier treatment on the transmission component of cable modem service was amply supported by — indeed compelled by — the FCC's own precedent defining the broadband market's competitive characteristics.[11]

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11. The *Portland* and *Brand X* rulings ascribe an intent to Congress to make a fundamental change in the law in the direction of *increased regulation* in a statute based on the premise that natural monopoly is a thing of the past and that *deregulation* and increased competition would benefit consumers. When the Ninth Circuit's statutory error is stripped away, its only basis for imposing a different conclusion rests on policy preconceptions that have no place in judicial review of agency action. *See* FCC Pet. 34a (Thomas J., concurring).

3. The legislative history of the definitional provisions at issue here demonstrates Congress's intent to import the prior agency and judicial precedent regarding the limitations on common carrier treatment into the 1996 Act. *First*, the Conference Report to the 1996 Act specifically states that the definition of telecommunications services "recogniz[es] the distinction between common carrier offerings that are provided to the public . . . and private services." H.R. CONF. REP. No. 104-458, at 115 (1996). Relying upon the text and legislative history, both the FCC and the D.C. Circuit have concluded that the definition of "telecommunications services" did *not* work any radical change in the scope of common carrier status but, rather, "manifest[ed] Congress' intention to maintain the basic public-private dichotomy" that predated the 1996 Act. *Virgin Islands Tel.*, 198 F.3d at 927; *see Cable & Wireless*, 12 F.C.C.R. at 8521-22.

Second, with respect to the classification of the transmission component of "information services," the legislative history reveals that, at one point, Congress considered a formulation of "telecommunications services" that included "[t]he underlying transport and switching capabilities on which [information] services are based." S. REP. No. 104-23, at 18 (1995). What is more, the proposed definition of "telecommunications service[s]" expressly included "the transmission, without change in form or content, of *information services*." *Id.* at 79 (emphasis added). In the Act as adopted, however, the proposed reference to "transmission of information services" in the definition of "telecommunications services" was omitted. By holding that every information service must contain a "telecommunications service" component, the Ninth Circuit violated one of the most "compelling" principles of statutory construction; it effectively reinserted the language that Congress consciously removed from the definition of "telecommunications service" as enacted.

INS v. Cardozo-Fonseca, 480 U.S. 421, 442-43 (1987) ("Congress does not intend *sub silentio* to enact statutory language that it has earlier discarded in favor of other language.").

4. Beyond its lack of support in the text, legislative history, or relevant precedent, the notion that through the definition of "telecommunications services" the 1996 Act created a wooden unbundling rule for the transmission component of an information service, regardless of market conditions, makes no sense as a matter of regulatory policy. Common carrier regulation is a *substitute* for competition, generally employed as a last resort where there are insuperable legal or economic barriers to market entry. *See* STEPHEN BREYER, REGULATION AND REFORM 37, 59 (1982). There is no need to imperfectly mimic competition through price or access regulation in markets where competition is present.

II. The Ninth Circuit's Reliance on the FCC's Outmoded Treatment of DSL Was Misplaced.

To the extent that parties argue that the FCC's own previous treatment of DSL supports the Ninth Circuit's conclusions, their claims are unavailing for two fundamental reasons.

1. As explained above, the FCC has never made an affirmative determination that market conditions warrant imposing mandatory common carriage obligations on DSL, but has merely applied those requirements reflexively based on the identity of the service provider. *See supra* p. 9. Instead, the FCC is now conducting proceedings to squarely address that issue for the first time. *See generally Wireline Broadband*

NPRM, 17 F.C.C.R. 3019; *ILEC Broadband NPRM*, 16 F.C.C.R. 22,745. Accordingly, the FCC's previous treatment of DSL was not based on any reasoned analysis of the standards established by its own precedent or the competitive conditions in the broadband market (or any analysis at all for that matter), and it cannot provide a basis for invalidating the FCC's conclusions in the *Declaratory Ruling*.

2. Given the competitive state of the broadband market, there is simply no justification for imposing mandatory common carrier obligations and the accompanying regulatory requirements on any broadband services, regardless of the identity of the provider. The Ninth Circuit's ruling, however, if left intact, would mean that all of these requirements would apply to cable modem service absent forbearance or the grant of a waiver by the FCC.

Those requirements impose a host of complex and costly mandates that deter investment, undermine competition, and cannot be justified in the competitive broadband market. As the FCC has repeatedly recognized, common carrier regulation causes affirmative harm in a competitive market. More than twenty years ago, the Commission stated that, where competition is present, services are best able to "burgeon and flourish" in an environment of "free give-and-take of the market place without the need for and possible burden of rules, regulations and licensing requirements." *Computer II*, 77 F.C.C.2d at 425-33; *see Regulatory & Policy Problems Presented by the Interdependence of Computer & Communications Servs. & Facilities*, 28 F.C.C.2d 291, 297-98 (1970).

For example, the tariffing and nondiscrimination requirements that apply under Title II of the Communications

Act, as well as the added requirements of the FCC's *Computer Rules*, generally require telecommunications carriers to offer "one-size-fits-all" products and services. This impedes the ability of broadband service providers to enter into mutually beneficial contractual arrangements with Internet content providers (such as the innovative compensation arrangements that prevail in other parts of the Internet). To the extent that they require mandatory access to risky new technologies and services at government-prescribed (cost-based) rates, these requirements also deter investment in innovative new technologies and services.[12]

The FCC has also correctly recognized that a tariffing regime, when imposed in a competitive market, "may facilitate, rather than deter, price coordination, because under a tariffing regime, all rate and service information is collected in one, central location," thereby rendering it easier for competitors to adjust prices in response to rate changes by each other. *Policy & Rules Concerning the Interstate, Interexchange Marketplace*, 11 F.C.C.R. 20,730, 20,740 (1996) (subsequent history omitted). Forcing *any* participant in a competitive market to disclose cost information, pricing information, and network architecture plans harms, rather than promotes, competition.

In addition, in the very order under review, the Commission correctly found that imposing a common carrier

12. *See Petition for Forbearance of the Verizon telephone companies Pursuant to 47 U.S.C. § 160(c)*, FCC 04-254, 2004 FCC LEXIS 6098, at *24-*25, *31-*33 (Oct. 27, 2004); *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 18 F.C.C.R. 16,978, 17,126-27, 17,145, 17,153 (2003) ("*Triennial Review Order*"), *vacated in part on other grounds sub nom., United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004).

regime on cable modem providers would conflict with Congress's command in Section 706 of the 1996 Act that the FCC remove barriers to entry and encourage broadband investment and deployment. FCC Pet. 104a; *see also id.* at 26 (common carrier obligations could lead carriers to "raise their prices and postpone or forego plans to deploy new broadband infrastructure"). The Commission and the courts have recognized that imposing "common carriage" duties and related regulatory requirements such as unbundling obligations deter capital investment by existing and potential competitors in the broadband market.[13]

In the competitive broadband market, imposing mandatory common carriage obligations on any provider would be unlawful. As an initial matter, this result would directly contravene the FCC and federal court precedent outlined above that prohibits imposing mandatory common carrier requirements in the absence of significant market power. *See supra* pp. 7-9, 23-25. This result would also violate Congress's clearly expressed command in Section 706 and elsewhere that the FCC take steps to promote broadband deployment and that the Internet continue to develop in an environment "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2); *see* S. CONF. REP. NO. 104-230, at 1 (1996) (Joint Explanatory Statement); *S.W. Bell Tel. Co. v. FCC*, 153 F.3d 523, 544 (8th Cir. 1998); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997).

13. *See, e.g., Wireline Broadband NPRM*, 17 F.C.C.R. at 3042-43 (noting that a minimal regulatory environment is necessary to "encourage market participants to deploy broadband networks more expeditiously and increase facilities-based competition"); *see also AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428-429 (1999) (Breyer, J., concurring in part and dissenting in part); *USTA II*, 359 F.3d at 584; *VOIP NPRM*, 19 F.C.C.R. at 4864; *Triennial Review Order*, 18 F.C.C.R. at 16,984, 17,149; *Access Charge Reform Order*, 12 F.C.C.R. 15,982, 16,094 (1997).

Moreover, any attempt to subject broadband providers to mandatory common carrier obligations would raise significant First Amendment concerns. Verizon's broadband platform is a medium through which it offers a form of speech – its own Internet and other content services – to its customers.[14] Broadband, in other words, is the microphone through which telephone companies (like their cable competitors) speak, and governmental restrictions that inhibit the reach or use of that microphone necessarily impinge on First Amendment interests.[15] This Court has traditionally found forced access requirements to be justified only in the presence of significant market power, *see, e.g., Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196-204 (1997); *Turner I*, 512 U.S. at 661, but no such justification exists here, *see supra* pp. 2-3, 26.

14. Federal courts have uniformly recognized that regulations affecting the ability of telephone companies to employ their facilities for expressive purposes are subject to heightened First Amendment scrutiny. *See, e.g., U.S. West, Inc. v. United States*, 48 F.3d 1092 (9th Cir. 1994), *vacated on other grounds*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181 (4th Cir. 1994), *vacated on other grounds*, 516 U.S. 415 (1996); *S. New Eng. Tel. Co. v. United States*, 886 F. Supp. 211 (D. Conn. 1995); *S.W. Bell Corp. v. United States*, No. 3:94-CV-0193-D, 1995 WL 44414 (N.D. Tex. Mar. 27, 1995); *BellSouth Corp. v. United States*, 868 F. Supp. 1335 (N.D. Ala. 1994); *Ameritech Corp. v United States*, 867 F. Supp. 721 (N.D. Ill. 1994); *NYNEX Corp. v. United States*, No. 93-323-P-C, 1994 WL 779761 (D. Me. Dec. 8, 1994).

15. This Court has extended First Amendment protection to numerous "speech distribution" facilities or activities, including newsrack placement, *see City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750, 768 (1988), the public distribution of pamphlets, *see Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938), control over the participants in a parade, *see Hurley v. Irish-American Group*, 515 U.S. 557, 570 (1995), and a cable operator's control over the expressive capacity of its cable system, *see Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 629 (1994) ("*Turner I*").

The Ninth Circuit was accordingly wrong to place any reliance at all on the Commission's prior treatment of DSL. And, to the extent that the FCC's *Declaratory Ruling* contains any error at all, the Commission's error lies in its failure to address the regulatory disparity between cable modem service and DSL that its decision left in place.

III. A Remand Is Necessary for the FCC to Address Its Differential Treatment of Functionally Equivalent Broadband Transmission Services in Light of this Court's Decision.

If this Court determines, as Verizon believes it must, that the Ninth Circuit erred in its interpretation of the statutory definitions at issue in this case and upholds the FCC's classification of cable modem service as an "information service" subject to little or no regulation, the issues of regulatory parity and the proper classification of DSL raised in Verizon's petition for review will again rise to the fore. The NinthCircuit did not address those issues based on its erroneous conclusion that cable modem service includes a separate "telecommunications service" (imposing its own vision of "regulatory parity"). Because the Commission did not even address these issues in the *Declaratory Ruling*, this case should be remanded to the FCC to expeditiously rule on the proper statutory classification for DSL in light of this Court's opinion.

1. As noted above, and as Verizon demonstrated throughout the course of the proceedings below, the Commission itself recognized the link between cable modem service and DSL in the *Notice of Inquiry* that resulted in the order at issue here. *Notice of Inquiry*, 15 F.C.C.R. at 19,293; *see supra* p. 12. Issuance of the *Notice* was expressly

premised upon "[t]he convergence of technologies" that allows the provision of high-speed services over a variety of facilities, and the FCC expressly sought comment on "the impact of [its] approach [to cable broadband service] on other providers of high-speed services." *Notice of Inquiry*, 15 F.C.C.R. at 19,287; *see id.* at 19,287-91, 19,293, 19,296, 19,304-05.

2. Particularly given that it expressly invited comment on the consequences of its decision on the appropriate classification of cable modem services for other types of broadband services, the FCC was not at liberty to simply ignore the comments of Verizon and others demonstrating that continued disparate treatment of DSL services would be unlawful. Indeed, as Verizon demonstrated in its petition below, disparate treatment of DSL services not only would be utterly irrational – since it would impose unnecessary burdens on a secondary player in the broadband market and impede its ability to compete with the market leader – but also would violate the principles of competitive and technological neutrality embodied in the Communications Act. *See* 1996 Act, § 706(c)(1) (defining "advanced telecommunications capability" "without regard to any transmission media or technology"); 47 U.S.C. § 153(46) (defining "telecommunications service" "regardless of the facilities used"). And by imposing discriminatory regulatory obligations (including differential taxation) on similarly situated speakers, disparate treatment of cable modem service and DSL would flatly violate the First Amendment.[16]

16. *See, e.g., City of Ladue v. Gilleo*, 512 U.S. 43, 51 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 424 (1993); *see also Turner I*, 512 U.S. at 641. Particularly problematic is the fact that DSL providers must pay 10.7 percent of their gross (Cont'd)

Under these circumstances, the Commission was under an obligation to eliminate the disparity between cable modem service and DSL or, at a minimum, provide a reasoned explanation for its failure to do so. Indeed, under well-settled principles of administrative law, the FCC was required to provide a reasoned factual and legal basis for its decision. This includes *some* response to significant comments that lay within the scope of the issue as defined by the agency itself. *See Iowa v. FCC*, 218 F.3d 756, 759 (D.C. Cir. 2000); *see also Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). The Commission was also obligated to respond to any constitutional objections and, in particular, First Amendment concerns connected with a particular regulatory path. *E.g., Nat'l Treasury Employees Union v. Fed. Labor Relations Auth.*, 986 F.2d 537, 540 (D.C. Cir. 1993); *Meredith Corp. v. FCC*, 809 F.2d 863, 872-73 (D.C. Cir. 1987). Likewise, the FCC was required to provide a reasoned explanation of conflicting prior precedents or revise those past decisions to achieve consistency. *See State Farm*, 436 U.S. at 42-43; *Nat'l Fed'n of Fed. Employees v. Fed. Labor Relations Auth.*, 369 F.3d 548, 553 (D.C. Cir. 2004).

What the Commission could not do is to address only half of the regulatory problem framed by its own *Notice of*

(Cont'd)
revenues to support universal service, while cable modem service providers are not subject to any such obligation. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3054; 47 U.S.C. § 254; *Proposed First Quarter 2005 Universal Serv. Contribution Factor*, DA 04-3902, 2004 FCC LEXIS 6989 (Dec. 13, 2004). This suppresses the expressive output of one provider in the same manner as disparate taxation of competing media outlets and is contrary to the First Amendment. *See, e.g., Minneapolis Star & Tribune Co. v. Minn. Comm'r*, 460 U.S. 575, 585 (1983).

Inquiry. *State Farm*, 463 U.S. at 43.[17] The Commission nonetheless ignored all of this and arrived at a statutory classification of cable-based Internet access without regard to the proper treatment of competing services.

3. If this Court reverses the Ninth Circuit's *per curiam* opinion (as we believe it should), the issues raised in Verizon's properly preserved petition for review still must be addressed. Given the unique posture of this case, it is appropriate to allow the agency charged with enforcement of the Communications Act to make the initial determination regarding the application of this Court's decision in this case to DSL and other broadband technologies. If the Commission is authorized or compelled to treat cable modem service as an "information service" under the Communications Act, the FCC must apply the principles in the *Declaratory Ruling* and this Court's decision in determining the appropriate treatment of DSL. The FCC, however, wholly failed to address this issue or articulate any basis for its decision below. Under circumstances such as these, "a remand to the Commission is the proper course in order that the Commission in the first instance may clearly enunciate" the grounds for its decision. *FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 520 (1979); *see Gulf Power*, 534 U.S. at 347 (Thomas, J., concurring in part and dissenting in part) ("I would vacate the Court of Appeals' judgment and remand the cases to the FCC with instructions that the Commission clearly explain the specific statutory basis" for its decision.).

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17. *See Gulf Power*, 534 U.S. at 347 (Thomas, J., concurring in part and dissenting in part) (stating that the case should have been remanded because "the FCC failed to engage in reasoned decisionmaking" by declining to decide how cable broadband Internet access should be classified under the Act before asserting jurisdiction over pole attachments that provide commingled cable television service and broadband Internet access).

This is consistent with the practice of appellate courts, which often remand petitions for review to the agency on their own motion in light of intervening precedent from this Court. *See, e.g., Prill v. NLRB*, 755 F.2d 941, 950-54 (D.C. Cir. 1985); *Times Publ'g Co. v. NLRB*, 576 F.2d 1107, 1109-10 (5th Cir. 1978). Accordingly, this Court should remand the case to the FCC with instructions to address the issues raised by Verizon's petition for review in light of this Court's ruling.

CONCLUSION

For the forgoing reasons, the Ninth Circuit's *per curiam* decision should be vacated and remanded to that court with instructions to remand the case directly to the FCC to expeditiously address the issues raised in Verizon's petition for review.

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
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v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF FOR CABLE-INDUSTRY PETITIONERS

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REPLY BRIEF

In our opening brief, we explained that the FCC's conclusion in the order under review — that cable operators providing cable modem service do not provide a separate "telecommunications service" — is fully consistent with the Communications Act and is not otherwise unlawful. In their briefs, respondents argue that the FCC's view violates the Communications Act, is contrary to the administrative *Computer II* regime, and constitutes poor policy. As more fully explained below, however, respondents' views find support in neither statutory definitions nor *Computer II*, and respondents' policy views are contrary to those of the FCC — the agency to which Congress delegated cable modem service's classification.

In particular, respondents overlook that the statutory definition of "telecommunications service" is entirely consistent with pre-1996 common-carrier law, capturing firms insofar as they (whether voluntarily or by compulsion) offer "telecommunications," while not capturing firms insofar as they offer "information service" (computer functionality provided via telecommunications). As the FCC reasonably determined, cable operators providing cable modem service fall on the "information service" side of the line: they have not chosen to offer "telecommunications" and have not been compelled to do so.

Respondents are wrong in reading the definition of "telecommunications service" as overturning the FCC's view that information service providers should be free from common-carrier regulation — a decades-old policy that has served the Nation well. All the evidence (in the statutory text, the legislative history, and the 1996 Act's overall deregulatory purpose) points to the conclusion that Congress did not intend to break with prior practice.

And, if there were any doubt on that point, the FCC's view would still be entitled to deference.

I. RESPONDENTS' STATUTORY ARGUMENT IS UNCONVINCING.

A. An Information Service's "Telecommunications" Component Does Not Imply a "Telecommunications Service."

Respondents' argument based on statutory language runs as follows: (1) cable operators offer cable modem service "for a fee directly to the public"; (2) cable modem service is an "information service" and thus by definition provided "via telecommunications"; and (3) therefore, cable operators "offe[r] . . . telecommunications for a fee directly to the public."[1] But respondents' conclusion does not follow from their premises.

The statute defines "telecommunications service" as involving an "offering of telecommunications for a fee directly to the public." The statute recognizes "information service" as a service distinct from "telecommunications service," and defines it as having a "telecommunications" input. In the ordinary meaning of "offer," a firm offering a finished product is not making a separate offer of each individual ingredient. Thus, the definition of "telecommunications service" does not compel the conclusion that, when "information service" is being offered, the "telecommunications" ingredient is also being offered for a fee directly to the public.[2]

[1] *See, e.g.*, Earthlink at 18; MCI at 16.

[2] *See* NCTA Opening Br. 21 & n.26.

B. Respondents' View Would Turn Most Information Service Providers into Common Carriers.

Respondents' view of the statute not only is wrong on its own terms but also attributes to Congress an unlikely intent: to make common carriers out of almost all information service providers. Almost all information service providers incorporate some "telecommunications" in their services. For example, even dial-up Internet Service Providers ("ISPs") transport information — often over massive distances — from a local point of presence to remote networks and computers.[3] Yet, the FCC has always refused to regulate information service providers as common carriers.[4] It is inconceivable that Congress meant to overturn that decades-old deregulatory policy through a deregulatory statute's ambiguous definitions. Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions — it does not, one might say, hide elephants in mouseholes."[5]

Nonetheless, respondents say that this is precisely what Congress did: they posit that, after the 1996 Act, all information service providers incorporating telecommunica-

[3] *See, e.g.*, http://computer.howstuffworks.com/internet-infrastructure1.htm. Insofar as respondents equate dial-up ISPs with pure content providers, *see, e.g.*, CPUC at 16 (equating ISPs with Expedia), they are wrong.

[4] *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 11501, ¶ 69 (1998) ("*Report to Congress*"). CPUC (at 15-16) argues that "last mile" facilities (facilities carrying traffic from the subscriber's premises to an ISP's local point of presence) should be treated differently, but that distinction has no basis in the statutory text.

[5] *Whitman v. American Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *see Jones v. United States*, 526 U.S. 227, 234 (1999) ("Congress is unlikely to intend any radical departures from past practice without making a point of saying so.").

tions into their service become common carriers.[6] Earthlink tries to escape that result by arguing that the FCC exercised "forbearance" decades ago. Before 1996, however, the FCC did not have forbearance authority.[7] Regardless, if — as Earthlink says — the 1996 Act's definition of "telecommunications service" changed the law, it is illogical to suggest that the FCC could neutralize that change in advance.

C. Respondents Are Wrong in Arguing That the FCC's Reasoning Allows Avoidance of Title II.

Unable to explain away the absurd consequences resulting from their own reading, respondents nonetheless accuse the FCC's reading of producing absurd results.[8] According to respondents, the FCC's decision will allow any firm to avoid Title II regulation merely by adding computer functionality to telecommunications.[9]

1. Respondents' suggestion that it is strange that common-carrier status should depend on a firm's own choices ignores Title II's basic plan. Insofar as here relevant, Title II imposes duties only on "common carriers."[10] There are two ways in which a firm can become a common carrier: (1) by voluntary practice (*i.e.*, by holding itself out as providing telecommunications for a fee directly to all comers); or (2) by compulsion (*i.e.*, where the FCC determines that the firm should be required to hold itself out as a common carrier because the firm has market power).[11] It is black-letter law that, without more, firms that decline to hold themselves out as common carriers are *not* subject to common-carrier duties.[12]

Far from being unusual, the FCC's decision under review is fully in keeping with that principle. As the FCC correctly determined, a cable operator relying on its own telecommunications facilities provides "telecommunications" only to its own affiliated ISP.[13] The FCC has further recognized that, when a cable operator provides access to one or more unaffiliated ISPs, it may be providing them with "telecommunications" but, unless it holds itself out to all ISPs indiscriminately, is only a private carrier.[14] It would make no sense to treat a cable operator doing

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[6] *See* Earthlink at 45; MCI at 30.

[7] *See* CPUC at 32 ("Congress in § 160 gave the FCC a powerful new deregulatory tool of forbearance, which the agency previously lacked."); *see also MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 234 (1994) ("[T]he Commission's estimations . . . of desirable policy cannot alter the meaning of the Federal Communications Act of 1934. For better or worse, the Act establishes a rate regulation, filed tariff system for common carrier communications . . . ."); *MCI Telecomms. Corp. v. FCC*, 765 F.2d 1186, 1193 (D.C. Cir. 1985) (Ginsburg, J.) (rejecting notion that FCC had "general authority to forbear from full Title II common carrier regulation").

[8] Earthlink at 21.

[9] *Id.* at 21; MCI at 22; CPUC at 21.

[10] *See* CPUC at 33 ("much of Title II applies only to . . . 'common carriers'"); *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1483 (D.C. Cir. 1994) ("only common carrier activity falls within the Commission's regulatory power under Title II").

[11] *See, e.g., National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) (firms are common carriers where they actually "hold themselves out to serve indifferently" or where they are under "legal compulsion thus to serve indifferently"); *AT&T Submarine Sys., Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21585, ¶ 9 (1998) ("the focus of our inquiry [under the compulsion prong] is whether the [firm] has sufficient market power to warrant regulatory treatment as a common carrier").

[12] *See, e.g., Southwestern Bell*, 19 F.3d at 1481.

[13] *See Report to Congress* ¶ 69 n.138; Pet. App. 98a (¶ 41).

[14] *See* Pet. App. 112a-114a (¶ 55).

business with multiple ISPs as a private carrier while treating a cable operator doing business with only its own affiliated ISP as a common carrier.

2. Respondents' suggestion that the decision under review will make Title II easy to avoid is likewise wrong. Insofar as firms already provide services on a common-carrier basis, they cannot stop providing them unless the FCC grants permission to that effect.[15] As for new services, the FCC's decision that one particular service is an information service does not impair the FCC's ability to classify other services on a case-by-case basis. When it does so, it will find that many services do not lend themselves to adding the amount of computer functionality necessary for information-service status.[16] And, finally, the FCC can in many cases exercise its power to turn a non-common-carrier service provided by a firm with market power into a common-carrier service.

3. Respondents are also wrong in suggesting that it is irrational to have a rule under which a component that might be regulated when offered alone is not regulated when it is part of a service that has additional functionality. To the contrary, the FCC's refusal to regulate the "telecommunications" component of an "information service" bundle has a sound basis in policy. In *Computer II*, the FCC determined that information services should be unregulated. It further found that regulating the communications component of enhanced services threatened regulatory creep: "an indirect forcing of currently unregulated

[15] *See* 47 U.S.C. § 214(a).

[16] *See, e.g., AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket No. 03-133, FCC 05-41, ¶¶ 14-21 (rel. Feb. 23, 2005) (rejecting attempt to turn long-distance telephone service into information service).

entities to acquire common carrier status in order to obtain the same degree of flexibility afforded a resale common carrier."[17] That policy basis is entirely sensible.

4. Respondents' fall-back position is that the communications and computer functionality of cable modem service are not truly intertwined. In particular, respondents make much of subscribers' ability to "click-through" to third-party web pages.[18] Respondents' argument (which can be made with equal force about all ISPs, including Earthlink) starts from a legally flawed premise. Because "information service" is defined as "the offering of a *capability* for" data manipulation, whether every communication involves data manipulation is irrelevant.[19] And, even if functionality not involving data-manipulation "capability" could be isolated, it would not matter so long as that functionality were offered as an integrated bundle with computer functionality.[20] Besides, respondents' "click-through" argument rests on a mistaken factual basis. Click-through almost always involves "caching"[21] and

[17] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384, ¶ 112 (1980) ("*Computer II*").

[18] *See* Earthlink at 16; MCI at 25; CPUC at 10, 20 n.7, 22.

[19] *See* Pet. App. 95a (¶ 38) ("Internet access service . . . is an information service . . . regardless of whether subscribers use all of the functions provided as part of the service, such as e-mail or web-hosting").

[20] *See id.* 94a-95a (¶ 38) ("[C]able modem service is a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities and to realize the benefits of a comprehensive service offering.").

[21] *See id.* 66a-67a (¶ 17 & n.76).

access to the "DNS,"[22] each of which involves computer functionality.

D. Earthlink's Attempts at Sowing Statutory Confusion Are Unconvincing.

1. The Government's opening brief pointed out that "information service" is defined in such a way as involving a change in the content of transmitted information. In contrast, "telecommunications service" is defined (indirectly, through the definition of "telecommunications") as involving transmission of information "without change." Thus, the statute suggests that a single service cannot simultaneously be an "information service" (involving change) and a "telecommunications service" (involving no change). But Earthlink (at 37-38) suggests that this view is self-defeating: if there is no "telecommunications," it says, there can be no "information service," which is defined as offered "via telecommunications."

Earthlink ignores that the question here is not whether the statute encourages (or even compels) the FCC's policy decision to leave information services unregulated but whether the statute *prohibits* it. Besides, the FCC's view — far from being self-defeating — is correct. Contrary to Earthlink's argument, the FCC's reasoning does not imply that there is no "telecommunications." Rather, it reflects the simple logic that combining functionality involving no change with functionality involving change results in a service involving change.

2. Earthlink attempts to sow additional confusion by pointing to the FCC's statement that cable operators are "merely using telecommunications to provide end users with cable modem service."[23] Earthlink says that this is at

[22] *See id.* at 66a (¶ 17 & n.74), 92a (¶ 37), 95a (¶ 38 n.153).

[23] *Id.* 98a (¶ 41).

odds with the definition of "telecommunications" as transmission of information "of the user's choosing": according to Earthlink, "[t]he user in this context — *i.e.*, the party that selects the information transmitted — is the subscriber, and not the cable company."[24]

This argument is a play on the word "use." When the FCC stated that cable operators are "using telecommunications to provide end users with cable modem service," it meant that, to produce an "information service," cable operators incorporate "telecommunications" as an input. The agency did not identify the "user" for purposes of Section 3(43). Even if Earthlink were right that the Section 3(43) "user" is the subscriber, that would not be inconsistent with the FCC's view that the ISP "uses" telecommunications in the sense of employing it as an input. Similarly, it would not mean that the subscriber receives an "offering of telecommunications" — just as there is no such "offering" when Earthlink buys DSL transport from a telephone company and combines it with computer functionality to create a retail ISP service.

II. RESPONDENTS' RELIANCE ON *COMPUTER II* IS MISPLACED.

A. Respondents Overlook That *Computer II* Imposes Duties Only on Common Carriers.

As we explained in our opening brief (at 26-27), *Computer II* — insofar as relevant here — stands for two distinct principles. *First*, providers of "enhanced services" were left unregulated: even though many enhanced service providers use communications functionality that they incorporate into their service, they were not subjected to common-carrier regulation.[25] In particular, enhanced ser-

[24] Earthlink at 39.

[25] *See Computer II* ¶¶ 114-123.

vice providers were not required to separate their enhanced services into separate computer and communications components.[26]

Second, "common carriers" were permitted to offer information services only subject to certain safeguards. For major carriers, this included a separate-subsidiary requirement that, in practice, meant unbundling. "Other common carriers" — including long-distance entrants like MCI and Sprint — were subject to a lesser requirement, set forth in Paragraph 231: "those carriers that own common carrier transmission facilities and provide enhanced services, but are not subject to the separate subsidiary requirement, must acquire transmission capacity pursuant to the same prices, terms, and conditions reflected in their tariffs when their own facilities are utilized."[27]

Whatever Paragraph 231 requires, it applies only to "common carriers" — not, as respondents would have it, to any "owner of a telecommunications facility."[28] Cable operators have never been viewed as common carriers.[29] To the contrary, cable operators were listed in *Computer II* itself as an example of the black-letter principle that "all those who provide some form of transmission services are not necessarily common carriers."[30] And cable operators did not become common carriers when they began providing cable modem service: in *Computer II*, the FCC expressly rejected the notion that the communica-

[26] *See id.* ¶¶ 102-113.

[27] *Id.* ¶ 231.

[28] Earthlink at 24; *see also id.* at 45 ("facilities-based . . . providers of information services"); MCI at 32, 38 ("owners of transmission networks").

[29] *See* NCTA Opening Br. at 28 n.53.

[30] *Computer II* ¶ 122.

tions component in an enhanced service turns its provider into a common carrier.[31]

Thus, properly understood, *Computer II* does not help respondents — it forecloses their position. And, if there were any doubt about that, the FCC's interpretation of its own policy would be entitled to the most robust form of deference.[32]

B. Respondents Are Wrong in Arguing That the Decision Below Is Inconsistent with Post-*Computer II* Precedent.

Respondents claim that the order under review is inconsistent with an order in which the FCC held that, when local telephone companies provide broadband Internet service (so-called DSL), they must provide the telecommunications component separately to rival ISPs.[33] But these companies unquestionably are "common carriers," and thus unquestionably are subject to the requirements of the *Computer Inquiries*. And, insofar as the FCC required unbundling of DSL, it did so pursuant to the requirements applicable only to incumbent LECs — not (as respondents imply) pursuant to *Computer II* ¶ 231.

Respondents are also wrong in relying on precedent rejecting common carriers' attempts at avoidance. In the cases on which respondents rely, common carriers argued that, when they combined telecommunications with computer functionality, the result was an information service

[31] *See id.*

[32] NCTA Opening Br. at 28 & n.52.

[33] *See* Earthlink at 25-26 (relying on *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24011, ¶ 36 (1998)); *see also* MCI at 35; CPUC at 23.

free from common-carrier regulation.[34] This precedent simply stands for the proposition that, when a carrier is subject to a duty to offer a particular service on a common-carrier basis, that duty does not disappear when computer functionality is added.[35] It does not address the question here: whether a particular service is provided on a common-carrier basis in the first place.

For the same reason, Earthlink's reliance on "MFJ" precedent misses the point.[36] Under the MFJ, Bell companies were prohibited from providing "interexchange telecommunications services," but, after 1987, were allowed to provide certain "information services." Bell companies relied on that fact by arguing that, when they bundled long-distance service with computer functionality, the combination became an information service, which they were allowed to provide. Not surprisingly, the D.C. Circuit held that, just as adding computer functionality cannot make an underlying common-carrier duty disappear, it cannot dispel an underlying prohibition.[37]

C. Attempts To Bring Cable Operators Within *Computer II*'s Scope Are Unconvincing.

Respondents next argue that some cable operators *are* common carriers: they argue that a few cable operators

[34] *See, e.g.*, Earthlink at 24 (citing *Independent Data Manufacturer's Association, Inc.*, Memorandum Opinion and Order, 10 FCC Rcd 13717 (CCB 1995)).

[35] *See, e.g., Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd 1, ¶ 274 (1988) ("the addition of [computer functionality] to a basic service neither changes the nature of the underlying basic service *when offered by a common carrier* nor alters *the carrier's* tariffing obligations").

[36] Earthlink at 24-25 (citing *United States v. Western Elec. Co.*, 907 F.2d 160 (D.C. Cir. 1990)).

[37] *See Western Elec.*, 907 F.2d at 163.

have been providing traditional circuit-switched telephone service, which — they say — qualifies them as common carriers.[38] But *Computer II* imposed obligations on firms that were "common carriers" in the sense that they had previously held themselves out as offering the telecommunications via which information services could be provided.[39] The cable operators to which respondents point have never done so. The FCC's refusal to extend *Computer II* to such cable operators is in keeping with the settled principle that a firm can be a common carrier for one purpose but not for another.[40] Besides, the FCC held that, if *Computer II* could be read to impose any requirements on such cable operators, those requirements should be waived.[41] Respondents' briefs do not challenge that waiver.

D. Respondents' Codification Argument Is Unconvincing.

Respondents also argue that, by passing the 1996 Act, Congress codified *Computer II*. Any codification argument is implausible: it is not reasonable to conclude from Congress's borrowing of a few definitions that it intended

[38] *See* Earthlink at 41 n.11; MCI at 26; CPUC at 44.

[39] *See, e.g., Computer II* ¶ 5 ("basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications").

[40] *See, e.g., Southwestern Bell*, 19 F.3d at 1481 ("The mere fact that petitioners are common carriers with respect to some forms of telecommunication does not relieve the Commission from supporting its conclusion that petitioners provide [other forms] on a common carrier basis.").

[41] *See* Pet. App. 102a (¶ 45).

to codify a complex body of substantive rules.[42] More importantly, respondents' argument cannot improve their position: if they lose under *Computer II*, they doubly lose under a codified *Computer II*.

Respondents' apparent answer is that, in the course of being codified, *Computer II* changed meaning — supposedly because Congress added to the definition of "telecommunications service" the words "regardless of the facilities used." Those words, respondents imply, mean that Congress meant to expand the unbundling requirements that *Computer II* imposed on common carriers to apply to all owners of telecommunications facilities.

Nothing in the words on which respondents rely supports their view. Those words imply nothing more than that, when a service is captured by the definition of "telecommunications service," it cannot escape on the ground that it is provided over a particular set of facilities. The FCC's decision in the order under review — that a provider of an "information service" does not provide a "telecommunications service" unless it provides "telecommunications" separately — applies to all facilities equally, and therefore is congruent with the statutory text. If Congress had wanted to make the radical departure respondents suggest, it would have done so explicitly.

Respondents' position is particularly untenable because they do not point to any debate concerning the massive expansion of *Computer II*'s unbundling duties that they

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[42] *Cf., e.g., Hannon v. United States*, 48 Fed. Cl. 15, 23 (Fed. Cl. 2000) ("The explicit incorporation by Congress of the retirement statutes' definition of a 'law enforcement officer' into FLEPRA is not a sufficient basis for reading into FLEPRA a requirement that the retirement statutes' review mechanisms through the MSPB must be utilized when reviewing pay issues."); *Crowley v. United States*, 398 F.3d 1329, 1334-35 (Fed. Cir. 2005) (same).

propose. Nor can respondents explain why the legislative history manifests a contrary intent: a sentence that might lend support for their view was removed from the Senate bill.[43] The FCC, when reviewing this and other evidence concerning the interplay between *Computer II* and the 1996 Act (incidentally, at the invitation of Congress itself), concluded in 1998 that Congress did not intend to effect the sea change that respondents are seeking.[44] In the years since then, Congress has not seen fit to change the law — a fact making it even less plausible that the FCC misread Congress's intent.

III. RESPONDENTS' OTHER ARGUMENTS ARE UNCONVINCING.

Finally, respondents present a grab-bag of other arguments, none of which is persuasive.

A. Respondents' Remaining Statutory Arguments Are Unconvincing.

1. Respondents continue to rely on Section 10 as somehow suggesting that cable modem service must contain a "telecommunications service."[45] As explained in our opening brief, however, Section 10 grants the FCC authority to refrain from applying common-carrier regula-

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[43] S. Rep. No. 104-23, at 79 (1995) ("The term includes the transmission, without change in the form or content, of information services and cable services, but does not include the offering of those services."); *see also* NCTA Opening Br. at 24.

[44] *See Report to Congress* ¶ 45 ("[A] decision by Congress to overturn *Computer II*, and subject [information] services to regulatory constraints . . . would have effected a major change in the regulatory treatment of those services. While we would have implemented such a major change if Congress had required it, our review leads us to conclude that the legislative history does not demonstrate an intent by Congress to do so.").

[45] *See* Earthlink at 42-43; CPUC at 32.

tion to particular common carriers in particular circumstances. The FCC had sought that power after entry by MCI and Sprint had focused attention on the problem that Title II's terms impose duties on all common carriers, even when it makes little sense to regulate common carriers lacking market power. Section 10 does not and could not logically imply that all firms (in the communications industry? in the economy at large?) are common carriers.

Nor is it persuasive for respondents to suggest that, given the forbearance safety valve, a common-carrier classification is not onerous. Section 10 allows the FCC to forbear only after conducting burdensome administrative proceedings. While those proceedings are pending, common-carrier duties remain in effect. Any forbearance order can be appealed. Just how difficult it can be for the FCC to forbear became clear when the FCC attempted to use its forbearance authority to deregulate the long-distance industry: interested parties managed to block deregulation for a full five years,[46] which no doubt meant billions of dollars to those who stood to profit from it.

2. Earthlink next argues that the last segment of the statutory definition of "telecommunications carrier" — "the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage"[47] — implies that cable modem service must contain a common-carrier service. Earthlink attempts to support its argument with a suggestion that cable modem service was offered well before 1996, which, it implies,

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[46] *See* News Release, *Detariffing of Long Distance Telephone Industry To Become Effective at the End of the Month* (rel. July 25, 2001) (available at http://www.fcc.gov/Bureaus/Common_Carrier/News_Releases/2001/nrcc0130.html).

[47] 47 U.S.C. § 153(44).

means that Congress must have been aware of the controversy concerning cable modem service's classification.[48]

This argument is unavailing. The purpose of the satellite clause was merely to clarify that one particular issue was for the Commission to resolve. It could not mean that all other firms are common carriers. Besides, at the time of the passage of the 1996 Act (February 1996), cable modem service was in its infancy,[49] making it unlikely that Congress would have identified a possible future classification issue. Earthlink's mistaken suggestion that cable modem service was being provided well before 1996 is based on a citation to a part of this Court's *Gulf Power* opinion that described a different data-related service.

3. Finally, respondents rely on the segment of Section 3(44) that provides that a telecommunications carrier "shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services."[50] According to respondents, this language reflects "Congress' understanding that services might be marketed together without altering their individ-

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[48] Earthlink at 34 n.10.

[49] *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, ¶ 47 (1998) (reporting that "as of October 1997," there were only "about 50,000 cable modem subscribers"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, ¶ 108 (Jan. 2, 1997) ("a number of cable system operators recently announced large orders for cable modems, and the near-term deployment of Internet access services was one of the most discussed topics at a recent industry trade show"); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, ¶ 127 (Dec. 11, 1995) ("[c]able access to the Internet currently is being tested").

[50] CPUC at 20; *see also* Earthlink at 39.

ual legal statuses."[51] In fact, the statutory language merely codified the established principle that, when a firm offers one service on a common-carrier basis, common-carrier regulation does not automatically become applicable to the firm's other services if they are not so offered.[52] Respondents have that principle exactly backward.

B. Respondents' Policy Arguments Are Unconvincing.

Respondents argue that the FCC's decision is wrong as a matter of policy — on the theory that, if cable operators are common carriers, they will be required to afford "access" to ISPs like Earthlink, and that this will benefit consumers.[53] The short answer is that, "regardless of their persuasiveness, the sort of policy arguments forwarded by [respondents] are properly addressed to the Commission or to the Congress, not to this Court."[54]

In any event, respondents' suggestion that requiring "access" will automatically increase consumer welfare by enhancing consumer choice is incomplete. All sharing obligations come with a drawback: there is no "guarantee that firms will undertake the investment necessary to produce complex technological innovations knowing that any competitive advantage deriving from those innovations will be dissipated by the sharing requirement."[55] For that reason, the D.C. Circuit has held that the Communica-

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[51] CPUC at 20.

[52] *See supra*, p.13 n.40.

[53] It seems at best uncertain whether "access" obligations would in fact result from respondents' theories, but there is no need to discuss that here: respondents' policy arguments are meritless regardless.

[54] *New York v. FERC*, 535 U.S. 1, 24 (2002).

[55] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 429 (1999) (Breyer, J., concurring in part and dissenting in part).

tions Act does not allow the FCC to impose access obligations unless there are particularly strong reasons to believe that they will make consumers better off.[56] Such a justification does not exist when cable operators are subject to robust competition from other providers of broadband Internet service, with additional competitors on the way.[57]

C. Respondents' Remaining Allegations of Arbitrariness Are Unconvincing.

Earthlink suggests that the order under review is inconsistent with the FCC's implementation of the so-called "CALEA" statute.[58] Earthlink is wrong. CALEA imposes duties to help law enforcement on "telecommunications carriers," but exempts providers of "information services."[59] Although "information service" is defined in a way similar to the definition of that term in the Communications Act,[60] CALEA defines "telecommunications carrier" differently: even if a firm is not a "telecommunications carrier" for purposes of the Communications Act, CALEA authorizes the FCC to "deem" the firm to be a "telecommunications carrier" for purposes of CALEA.[61] In a recent notice of proposed rulemaking, the FCC tentatively decided that it should exercise this "deeming" power with respect to cable modem service.[62] The FCC

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[56] *See United States Telecom Ass'n v. FCC*, 290 F.3d 415, 429 (D.C. Cir. 2002).

[57] *See* NCTA Opening Br. at 4-5.

[58] Earthlink 48-49.

[59] 47 U.S.C. § 1002(a), (b)(2)(A).

[60] *Id.* § 1001(6)(A).

[61] *Id.* § 1001(8)(B)(ii).

[62] *See Communications Assistance for Law Enforcement Act and Broadband Access and Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 15676, ¶ 47 (2004).

further interpreted CALEA to say that, when it exercises its "deeming" power, it not only places a firm inside the "telecommunications carrier" category but also removes it from the "information service" provider category.[63] Because this is based on a provision that has no analogue in the Communications Act, there is no inconsistency.

Finally, Earthlink argues that the FCC "ignore[d]" the views of the Ninth Circuit in the *City of Portland* decision, which Earthlink wrongly persists in claiming to have been based on the statute's plain language.[64] In fact, the FCC devoted three paragraphs to explaining why *Portland* was unpersuasive.[65] It pointed out that the Ninth Circuit had ignored that "under the Act telecommunications is distinct from telecommunications service," and that, "[t]hough by definition an information service includes a telecommunications component, the mere existence of such a component, without more, does not indicate that there is a separate offering of a telecommunications service to the subscriber."[66] Nothing more was required.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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[63] *See id.* ¶ 50.

[64] Earthlink at 8, 50; *accord* CPUC at 17.

[65] *See* Pet. App. 114a-116a (¶¶ 56-58).

[66] *Id.* at 116a (¶ 59).

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v.

BRAND X INTERNET SERVICES, ET AL.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA, PETITIONERS

v.

BRAND X INTERNET SERVICES, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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REPLY BRIEF FOR THE FEDERAL PETITIONERS

The fundamental question in this case is whether cable modem service must, as a matter of law, be segregated into distinct information and telecommunications services for purposes of regulation under the Communications Act, or may instead, as the FCC found, be classified as "a single, integrated service that enables the subscriber to utilize Internet access service through a cable provider's facilities." Pet. App. 95a. The text and congressional purposes of the Communications Act, 47 U.S.C. 151 *et seq.*, and the history of the Commission's regulatory treatment of information services fully support the Commission's classification decision. Respondents' arguments to the contrary rest on strained characterizations of the ambiguous statutory text and on mischaracterizations of the regulatory and legislative history, and must be rejected.

I. THE FCC REASONABLY CONCLUDED THAT CABLE MODEM SERVICE IS AN "OFFERING" OF A SINGLE, INTEGRATED INFORMATION SERVICE

1. The FCC's conclusion that cable modem service is an "offering" of a single, integrated information service finds ample support in the text of the Communications Act. The Act's definition of "telecommunications service" requires consideration of what is (1) "*offer[ed]*" (2) "for a fee" (3) "directly to the public." 47 U.S.C. 153(46) (emphasis added). Respondents essentially ignore the question of what is "offer[ed]" and move directly to whether cable modem service is provided "for a fee" and "to the public." See, *e.g.*, EarthLink Br. 18. As the Commission reasonably found, however, when examined from the perspective of "the nature of the functions that the end user is offered," cable modem service does not include an offering of pure transmission service (i.e., "telecommunications") because "[a]s provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other [information-processing] capabilities." Pet. App. 94a, 96a. See *id.* at 98a (analysis "focuses * * * on the single, integrated information service that the subscriber to cable modem service receives").

Respondents' argument to the contrary rests at bottom on the assumption that an "offering" of an integrated service or product must necessarily be viewed as the "offering" of each constituent part as well. EarthLink Br. 18-19; States Br. 18-22; MCI Br. 15-16. That assumption, however, is not well founded. The government's opening brief discusses the example of a New York-to-Los Angeles flight with a refueling stopover in Chicago, in which it would be far from obvious that the service offering must be disaggregated for regulatory purposes. See FCC Br. 27-28; see also NCTA Br. 21 & n.26. In *Chevron U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), the Court in a similar context affirmed an Environmental Protection Agency (EPA) regulation providing that multiple

pollution-emitting devices in a large facility need not each be deemed a separate "stationary source" under the Clean Air Act—an issue on which the EPA itself had adopted varying positions over time. See *id.* at 852-859.

As those examples illustrate, the answer to the question whether a multi-component service or item should be divided into its constituent parts for purposes of legal analysis depends on the legal context, purposes, and policies that are at stake. Congress entrusted the consideration and weighing of those factors in the first instance to the expert agency with responsibility for construing the statute. Thus, in *Chevron* itself, the EPA was entitled to deference when it determined that a group of multiple pollution-emitting devices constitutes a single "stationary source" under the Clean Air Act. 467 U.S. at 866. For the same reasons, deference is due to the FCC's expert determination that cable modem service is a single, integrated information service under the Communications Act without a separately regulated telecommunications service component.

Respondents' contrary argument would lead to a dramatic expansion of the scope of Title II's common carrier regulations. As NCTA explains, because most Internet service providers (ISPs) are responsible for some transmission of the subscriber's information—between their facility and the subscriber and/or between their facility and the Internet "backbone"—respondents' view results in making most independent ISPs providers of telecommunications services regulable under Title II of the Communications Act, 47 U.S.C. 201, even though such entities have always been deemed to be solely providers of information services. See NCTA Br. 20, 22; *In re Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,536 ¶¶ 73-75 (1998) (*Universal Serv. Report*).[1] That result is impossible to square with the

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[1] Respondents err in denying that their theory would turn independent ISPs into providers of telecommunications services. EarthLink argues (Br. 45) that the FCC exercised its forbearance authority in 1985 to

deregulatory purposes of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56; see pp. 15-19, *infra*.

2. Respondents state that it is "critical" to their argument that "subscribers [are] not required to use the information services offered by the cable company, but could 'click through' those services and use the telecommunications component of cable modem service for the sole purpose of reaching information services offered by other providers." EarthLink Br. 16; States Br. 20 n.7, 22; MCI Br. 15. That "critical" prong of respondents' argument, however, is both legally and factually incorrect.

In the first place, respondents err in suggesting that a subscriber's ability to "click-through" without utilizing certain information processing functions could negate the "information service" character of cable modem service. The Act's definition of "information service" encompasses the "offering of a *capability*" for retrieving and utilizing information or engaging in various information-processing activities. 47 U.S.C. 153(20) (emphasis added). A cable modem subscriber's choice not to utilize certain capabilities does not eliminate that capability or change the underlying character of the service offering.

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deregulate non-facilities-owning ISPs, but the FCC's forbearance authority did not even come into existence until the 1996 Act, and the FCC has never made a finding that the requirements necessary to forbear under 47 U.S.C. 160 have been satisfied with respect to independent ISPs. The States, by contrast, argue (Br. 46) that ISPs are not telecommunications service providers because they may lease, but do not own, the telecommunications facilities at issue. Nothing in the Act, however, specifies that only *owners* of facilities can be providers of telecommunications services. See *Universal Serv. Report*, 13 F.C.C.R. at 11,563 ¶ 129. See *In re Regulatory Policies Concerning Resale & Shared Use of Common Carrier Servs. & Facilities*, 60 F.C.C. 2d 261, 308 ¶ 101 (1976) ("The fact that an offeror of an interstate wire and/or radio communication service leases some or all of its facilities—rather than owning them— ought not have any regulatory significance. * * * The ultimate test is the nature of the offering to the public."), aff'd, 572 F.2d 17 (2d Cir. 1978), cert. denied, 439 U.S. 875 (1978) (agency history omitted).

In any event, respondents' argument is counterfactual. Cable modem service subscribers do not typically obtain or use pure transmission capacity, divorced from all information-processing features. Although "click-through" access enables subscribers to bypass the cable operator's web page, e-mail service, and the like, such access still entails the use of other information-processing features offered by the cable operator. Most fundamentally, by "clicking through" to another ISP's website, a subscriber is necessarily utilizing the cable provider's services to "interact[] with stored data * * * maintained on the facilities of" the other ISP (namely, the contents of the requested web pages, e-mail boxes, etc.) and is thereby utilizing the cable operator's "capability for * * * acquiring, * * * retrieving [and] utilizing * * * information". *Universal Serv. Report*, 13 F.C.C.R. at 11,830 ¶ 76; 47 U.S.C. 153(20).

In addition, "Internet access service generally includes using the DNS" (*i.e.*, the domain name system), which is a "data retrieval and directory service" that is "most commonly used to provide an IP address associated with the domain name (such as www.fcc.gov) of a computer." Pet. App. 92a. DNS capability "is necessary because routing of traffic over the Internet is based on IP addresses, not domain names," and "before a browser can send a packet to a website, it must obtain the address for the site." *Id.* at 66a n.98. The FCC has found that DNS provides "a general purpose information processing and retrieval capability," and it thus does not involve pure telecommunications functions. *Id.* at 93a. Another example of an information access and retrieval capability that subscribers generally do not bypass when using "click-through" access is "caching" (*i.e.*, storing) of popular content on local computer servers. See *id.* at 67a n.76.[2] Contrary to respondents' contention that "most of

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[2] The Act's definition of "information service" excludes "any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service."

what the end user purchases and values is raw, unadulterated transmission," MCI Br. 15, the fact is that the Internet access obtained by end users is integrally tied to information-processing functionality.

3. Respondents also err in contending (EarthLink Br. 37-39) that "information service" and "telecommunications service" cannot be deemed mutually exclusive. Nothing in the text of the Communications Act compels the conclusion that those two categories (which entail markedly different regulatory consequences) must overlap, and the Commission's conclusion that they do not is supported by the 1996 Act's legislative history and by decades of administrative practice, including the FCC's contemporaneous construction of the 1996 Act. See *Universal Serv. Report*, 13 F.C.C.R. at 11,516-11,517 & nn. 52-55 ¶ 33; *id.* at 11,521-11,524 ¶¶ 42-45; *EEOC* v. *Associated Dry Goods*, 449 U.S. 590, 600 n.17 (1981).

The text of the Act is entirely consistent with that view, because "telecommunications" is exclusively defined as "transmission * * * without change in the form or content of the information." 47 U.S.C. 153(20). Thus, "telecommunications" is limited to a "pure transmission path," as the Commission has consistently concluded in analyzing both that term and the related term "basic service," its predecessor under the *Computer Inquiries* regime. *Universal Serv. Report*, 13 F.C.C.R. at 11,536 ¶ 73; *In re Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, 77 F.C.C.2d 384, 419-420 ¶¶ 93, 95, 96 (1980) (*Computer II*) ("basic" service is "pure transmission capability"), aff'd, 693 F.2d 198 (D.C. Cir. 1982), cert. denied, 461 U.S. 938 (1983). Because an information service like cable modem service offers the ability to change the form or content of information and to generate, acquire, store, and retrieve information, it is by definition *not* limited to "pure transmission capability" (as would be required for it to be an offer of "telecommunications"), and accordingly the two categories of service offerings may appropriately be viewed as mutually exclusive. See FCC Br. 21-23.

47 U.S.C. 153(20). Respondents are correct that use of what EarthLink terms "incidental information management components" in providing traditional telephone service does not convert ordinary telephone service into an information service. See EarthLink Br. 16 n.4, MCI Br. 22-23. But information-processing capabilities such as the DNS and caching are *not* used "for the management, control, or operation" of a telecommunications network, but instead are used to facilitate the information retrieval capabilities that are inherent in Internet access. Their use accordingly does not fall within the statutory exclusion. Pet. App. 93a-94a & n.150.

Respondents mistakenly suggest (EarthLink Br. 37, 38) that the Commission's reasoning would exclude cable modem service from the category of "information service," because information services are by definition provided "via telecommunications" whereas cable modem service generally entails a change in the form or content of information. But the fact that cable modem service is not viewed as an "offering" of telecommunications (and hence is not a telecommunications service) does not mean that it does not contain a telecommunications *component*; to the contrary, the Commission has consistently found that Internet access generally, and cable modem service in particular, employ telecommunications in conjunction with information processing capabilities. Pet. App. 95a-98a. There is no "offering" of telecommunications because the Commission has reasonably concluded that the "offer" should be examined as a whole from the perspective of the subscriber.

II. UNDER LONG-SETTLED STANDARDS, CABLE MODEM SERVICE IS NOT A COMMON-CARRIER SERVICE UNDER THE COMMUNICATIONS ACT

A. Common Carrier Status Under The Act

Respondents place considerable reliance on the FCC's pre-1996 regulation of common carriers' "enhanced" service offerings under the *Computer II* regime. According to respondents, the FCC is obligated to regulate cable modem service in the 21st century using the same regulatory approach it adopted decades ago to govern telephone com-

mon carriers operating in a monopoly environment. Respondents' arguments are wholly unpersuasive.

1. The FCC's view that a provider of cable modem service has made an "offering" of only a single, integrated information service is consistent with the settled understanding of the Communications Act. A provider of telecommunications service is a common carrier under the Act. See 47 U.S.C. 153(44). It has long been settled that an entity may become a common-carrier provider of telecommunications services in two ways. The entity may either voluntarily choose to offer telecommunications (*i.e.*, pure transmission capacity) to the public generally as a common carrier, or, if "the public interest requires common carrier operation of the proposed facility," the Commission may require the entity to make such an offering. *In re Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8522 ¶¶ 14-15 (1997). See generally *Virgin Islands Tel. Corp.* v. *FCC*, 198 F.3d 921, 925-926 (D.C. Cir. 1999); *National Ass'n of Regulatory Util. Comm'rs* v. *FCC*, 525 F.2d 630, 642 (D.C. Cir.), cert. denied, 425 U.S. 992 (1976). Generally, the FCC has found that the public interest prong is satisfied if the entity involved has sufficient market power to warrant imposing a common-carrier requirement. See *Cable & Wireless*, 12 F.C.C.R. at 8522-8523 ¶¶ 15-16; *Virgin Islands Tel.*, 198 F.3d at 925.

2. Under that settled analysis, respondents' repeated complaints that the Commission has allowed cable operators' "self-interested economic choice," EarthLink Br. 26, to determine the regulatory status of their offerings ring hollow. Recognizing that cable operators have the same prerogative to choose how to offer their service as others under the Act will not cause common carriage regulation to "fall apart" or render Title II "a dead letter." EarthLink Br. 21; MCI Br. 14. One prong of the test for common-carrier status has always turned on business decisions by the entity in question —*i.e.*, whether the entity voluntarily chooses to offer pure transmission services indiscriminately to all purchasers. Cable modem providers have not done so. Pet. App. 97a.

Accordingly, cable modem providers are not common carriers—and not providers of telecommunications service—under that prong of the test.

3. The other prong of the "common carrier" test gives the Commission ample authority to require cable operators, if "the public interest requires," *Cable & Wireless*, 12 F.C.C.R. at 8522 ¶¶ 14-15, to break out the transmission component incorporated into their service and offer it as a separate, common-carrier service. But the Commission has not yet made such a determination. In its order below, the Commission issued a broad notice of proposed rulemaking seeking further comment on whether "to require that cable operators provide unaffiliated ISPs with the right to access cable modem service customers directly." Pet. App. 134a; see *id.* at 135a-136a. As a result of that further proceeding, the Commission could conclude that the public interest requires some sort of ISP access requirement short of common carriage, or even that cable operators must offer telecommunications on a stand-alone basis, such that they would become telecommunications carriers subject to Title II. At present, however, the Commission has not completed that further proceeding. Accordingly, cable operators are not now subject to common carrier obligations under Title II.

Respondents argue that the further notice of proposed rulemaking is largely illusory, because the Commission's classification decision precludes *all* federal regulation of cable modem service. The precise scope of the Commission's authority under Title I of the Communications Act, 47 U.S.C. 151, is not at issue in this case, and it is one of the subjects on which the Commission sought comments in its further notice. See Pet. App. 137a-141a. Nonetheless, Title I grants the Commission broad "regulatory authority over all 'interstate . . . communication by wire or radio.'" *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 173 (1968) (quoting 47 U.S.C. 152). Thus, even if a particular service is not regulated under Title II, "Commission jurisdiction (so-called 'ancillary' jurisdiction) *could* exist even where the Act does

not 'apply.'" *AT&T Corp.* v. *Iowa Utils. Bd.*, 525 U.S. 366, 380 (1999). The Commission has long asserted its ancillary authority over interstate information-processing services, see *Computer II*, 77 F.C.C. 2d at 432 ¶¶ 124-125, and it has exercised that authority. See, *e.g.*, *In re Implementation of Sections 255 and 251(a)(2) of the Communications Act*, 16 F.C.C.R. 6417, 6455-6462 ¶¶ 93-108 (1999) (asserting jurisdiction over voice mail and interactive menu services to promote disability access); see also Pet. App. 137a-138a.[3] Indeed, in proceedings before the FCC, some of the respondents have urged the Commission to exercise its Title I authority to require cable operators to make their transmission capabilities available to unaffiliated ISPs—a position directly contrary to respondents' arguments in this Court.[4]

B. The *Computer II* Regime Does Not Provide A Basis To Challenge The Commission's Decision In This Case

To support their assertion that the transmission component of cable modem service must be broken out as a separate offering of telecommunications, respondents invoke the

[3] The Commission may not use its Title I regulatory authority to contradict express statutory prohibitions. See *FCC* v. *Midwest Video Corp.*, 440 U.S. 689, 700 (1979); see also *United States* v. *Midwest Video Corp.*, 406 U.S. 649, 670 (1972) (FCC may use its ancillary authority to require cable operators to originate local programming). Nothing in the Communications Act, however, precludes the FCC from regulating cable modem service providers on a non-common-carrier basis or from determining, if it were to become necessary in the public interest, that such providers must provide service as common carriers.

[4] See Comments of EarthLink, Inc., CS Docket No. 02-52 (filed June 17, 2002), at 13 ("EarthLink believes that the Commission retains sufficient authority to require multiple ISP access" notwithstanding its decision to classify cable modem service as an information service); Reply Comments of WorldCom, Inc., GN Docket No. 00-185 (filed Jan. 10, 2001), at 32 ("The FCC retains ample authority to mandate nondiscriminatory access to [cable modem service's] telecommunications capability under * * * Title I."). Those comments are available through the Commission's website at http://www.fcc.gov/cgb/ecfs.

Commission's historical regulation of telephone common carriers and, in particular, the regulatory regime that the Commission developed in its *Computer II* proceeding in the 1980s. In *Computer II* the Commission concluded that (1) "enhanced" services (now encompassed in the "information service" category) generally should not be subject to regulation under Title II, notwithstanding their inclusion of a transmission component, 77 F.C.C. 2d at 428-435 ¶¶ 114-132, and (2) telephone common carriers would be allowed to offer enhanced services on an unregulated, non-tariffed basis, but that common carriers using their own transmission services to do so must also offer competing providers of enhanced services "non-discriminatory access" to those same transmission services, *id.* at 475 ¶¶ 230-231. See FCC Br. 33-35. Contrary to respondents' arguments, however, neither the Commission nor Congress has extended those obligations wholesale to providers of cable modem service.

1. The *Computer II* order does not stand for the sweeping proposition that "the telecommunications component of a bundled package offered by the owner of a telecommunications facility is separately regulated." EarthLink Br. 24; see MCI Br. 3, 37. Rather, *Computer II* compelled facilities-based *common carriers* (*i.e.*, traditional telephone companies) that provide "enhanced" services to offer the underlying pure transmission capacity separately on a common-carrier basis. That obligation imposed on telephone companies was an exercise of the Commission's broad authority to "regulat[e] the entrance of communications common carriers into the nonregulated field" of enhanced services. *GTE Serv. Corp.* v. *FCC*, 474 F.2d 724, 730 (2d Cir. 1973); see *Computer II*, 77 F.C.C. 2d at 389 ¶ 15, 391 ¶ 18. Nothing in *Computer II* suggests that its specialized requirements for telecommunications common carriers necessarily apply outside of that specific historical and regulatory context.[5]

[5] Indeed, the Commission subsequently made clear that, when "value added networks," which were *not* common carriers, offered enhanced ser-

The Commission thus reasonably rejected the view that the regulatory treatment of cable modem providers was dictated by the *Computer II* regime. See Pet. App. 100a. Whereas *Computer II* compelled "traditional wireline common carriers" to "offer the underlying telecommunications *as a stand-alone service*," *id.* at 99a, 100a (emphasis added), the Commission noted that no "requirement that such an offering be made" had been imposed on cable modem providers. *Id.* at 97a. Cable operators have not traditionally been regulated as common carriers, see *Computer II*, 77 F.C.C. 2d at 431-432 ¶¶ 122-123, and thus are not subject to the kind of forced "offering" of telecommunications to which telephone companies have historically been subject under *Computer II*. Accordingly, the FCC's reasoned conclusion that *Computer II* is inapplicable in this context is entitled to substantial judicial deference. *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997).[6]

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vices "in conjunction with basic transmission services" leased from third parties, the "entire offering" would be classified as a single, unregulated, enhanced service. *In re Independent Data Communications Mfrs. Ass'n*, 10 F.C.C.R. 13,717, 13,719-13,720 ¶¶ 17-18 (Common Carrier Bur. 1995); *In re Amendment to Section 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry)*, 3 F.C.C.R. 1150, 1170 n.23 (1988), vacated in part on other grounds, 905 F.2d 1217 (9th Cir. 1990) (agency history omitted). The Commission did *not* adopt the logic of respondents' approach, which would have mandated that such entities isolate the telecommunications component of their service offering so that it could be subject to regulation under Title II.

[6] The Commission also reasonably rejected arguments that it should at a minimum apply *Computer II* requirements to those cable modem services provided by cable operators that also offer local telephone service. Pet. App. 101a-104a. The Commission explained that *Computer II* requirements had never been applied outside the context of a traditional telephone network and that, even if *Computer II* did apply to cable operators providing local telephone service, the Commission would waive those requirements. *Id.* at 102a-104a. Imposing *Computer II* requirements on cable modem service whenever cable operators also offer local telephone service would treat some cable modem providers differently than others and would discourage competitive entry into former-monopoly local telephone markets. *Ibid.*; see *Verizon Communications, Inc.* v. *FCC*,

2. There is no basis for respondents' assertion that the 1996 Act extends to cable modem service providers the telephone companies' *Computer II* obligation to offer separately, on a common carrier basis, the telecommunications capability that they use in providing Internet access services. Rather than citing any provision of the 1996 Act that specifically imposes such a requirement, respondents invoke the Commission's statement in the *Universal Service Report*, 13 F.C.C.R. at 11,511 ¶ 21, that the 1996 Act's definitions of "telecommunications service" and "information service" "build upon frameworks established" in the *Computer II* proceeding. EarthLink Br. 22, 42; MCI Br. 34-35. Respondents misconstrue the relevant administrative history.

As the Commission explained in the *Universal Service Report*, Congress built upon the *Computer II* definitional "framework" in order to ensure that "information service providers are *not* subject to regulation as common carriers merely because they provide their services 'via telecommunications.'" 13 F.C.C.R. at 11,511 ¶ 21 (emphasis added). Thus, *Computer II*'s definitional framework directly supports the Commission's approach here. Under *Computer II*, "[a] basic transmission service is one that is *limited to* the common carrier offering of transmission capacity," whereas "[a]n enhanced service is *any offering* over the telecommunications network *which is more than a basic transmission service*." 77 F.C.C. 2d at 419 ¶ 93, 420 ¶ 97 (emphases added). Because cable operators' offerings are not "limited to" pure transmission, they would not be classified as basic service under *Computer II*. Respondents' real complaint, therefore, is not that the Commission departed from the *Computer II* definitional framework, but rather that it did not treat cable companies as if they were facilities-based telecommunications common carriers—an issue that *Computer II* did not address.

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535 U.S. 467, 489 (2002) (Congress sought to "give aspiring competitors every possible incentive to enter local retail telephone markets").

In any event, the Communications Act's definition of "information service" is broader than (and entirely subsumes) the *Computer II* term "enhanced service," because it is not limited to services offered over common carrier facilities. *In re Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act*, 11 F.C.C.R. 21,905, 21,956 ¶ 103 (1996). Respondents' contention that the Act codified and froze the entire *Computer II* regulatory framework gives no effect to Congress's substantive expansion of the information service category.

C. The FCC's Regulation Of DSL Providers Does Not Dictate Its Analysis Of Cable Modem Providers

1. Respondents err in contending (EarthLink Br. 25-26; States Br. 15, 23; MCI Br. 7) that the FCC's analysis of DSL service is inconsistent with the Commission's decision in this case. Consistent with its reasoning below, the Commission has concluded that, when DSL technology is used "to provide members of the public with a transparent, unenhanced, transmission path," it should be classified as a telecommunications service. *In re Deployment of Wireline Servs. Offering Advanced Telecommunications Capability* (*Advanced Servs. Order*), 13 F.C.C.R. 24,011, 24,030 ¶ 36 (1998). Under the *Computer II* regime, DSL providers (*i.e.*, traditional telephone companies) have historically been required to offer pure DSL transmission capability on a common carrier basis separately from their "enhanced" or information service offerings (which have not been treated as common carrier offerings at all).[7] Accordingly, the historical treatment of DSL technology flows from the Commission's historical treatment of telephone company monopolists when they offered new information services over their traditional

[7] Although the term "DSL" is commonly associated with Internet access, it also refers to the underlying transmission technology that increases the capacity of telephone lines. Telephone companies have offered that pure transmission technology on a stand-alone basis to various types of customers. See *Advanced Servs. Order*, 13 F.C.C.R. at 24,030 ¶ 36.

telephone networks. Cable operators lack similar obligations at this time because they have no comparable history of regulation as monopoly common carriers.

2. In any event, and contrary to respondents' assertions, the Commission has never stated that the Communications Act *requires* it to break an integrated DSL Internet access service into separate information and telecommunications services. To the contrary, the Commission has tentatively concluded that such a service, like cable modem service, prospectively should be classified as solely an information service under the Communications Act. *In re Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 F.C.C.R. 3019, 3030 ¶ 20 (2002); see FCC Br. 36 n.16. There is no basis for overturning the FCC's classification of cable modem service on the ground that the Commission has treated DSL differently, especially when the Commission is currently embarked on a proceeding to determine whether DSL providers (notwithstanding the historical reasons for their current treatment) should now be treated in the same manner as cable modem providers.

3. Contrary to respondents' contention (EarthLink Br. 41; States Br. 7; MCI Br. 20), the Commission's classification of cable modem service is consistent with the requirement that the statutory definition of "telecommunications service" should be applied "regardless of the facilities used." 47 U.S.C. 153(46). If the Commission had concluded that cable operators offer "telecommunications for a fee directly to the public," but nonetheless refused to classify that offering as a telecommunications service because it is provided through cable facilities rather than telephone facilities, respondents' argument might have merit. The Commission, however, rested its classification of cable modem service on a determination that cable modem service providers—unlike traditional telephone companies—have not made such an offering. Pet. App. 97a.

III. RESPONDENTS' OTHER CHALLENGES TO THE COMMISSION'S INTERPRETATION OF THE COMMUNICATIONS ACT HAVE NO MERIT

A. The Commission's Classification Of Cable Modem Service Is Consistent With The Policies Of The Act

1. Respondents argue that the Commission's interpretation of "telecommunications service" as an offering of pure transmission allows cable modem service providers "to escape regulation" under Title II. EarthLink Br. 14. As explained above, however, a provider that is under no obligation to make an "offering of telecommunications for a fee directly to the public" is permitted under the Act to refrain from doing so, and thus to remain outside the scope of Title II.

Nor can common carriers subject to Title II eliminate their common carrier status through mere pricing changes, as EarthLink also suggests (Br. 14). Telecommunications common carriers cannot cease providing telecommunications service without Commission authorization, 47 U.S.C. 214(a); and *Computer II* demonstrates that the Commission has ample authority to preclude evasion of Title II by common carriers. Under the Commission's approach, moreover, the classification of a service turns on "the nature of the service being offered" and "whether, functionally, the consumer is receiving two separate and distinct services." *Universal Service Report*, 13 F.C.C.R. at 11,530 ¶¶ 59, 60. The Commission thus classified cable modem service as a unitary information service not merely because subscribers pay a single price for all the capabilities of the service, but also because the transmission component serves no function other than to "enable[] the subscriber to utilize Internet access." Pet. App. 95a.[8]

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[8] Local telephone service provides an obvious contrast to cable modem service. Traditional telephone service provides a "pure" telecommunications link between the calling and called parties. Adding voice mail or another information-processing feature as part of a local telephone package does not affect subscribers' use of that telecommunications link for purposes other than accessing voice mail or other forms of information services. Cf. *AT&T Corp. Pet. for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, FCC 05-41 (filed Feb. 23, 2005) (calling card that automatically provides advertisement prior to call remains "telecommunications service," because the card "offer[s]" only telephone service and does not provide an information service "capability").

2. Respondents attack the Commission's classification of cable modem service on the basis of their own policy view that the common carrier obligations in Title II should apply to that service. EarthLink Br. 28-32, States Br. 28-32; MCI Br. 18-19. They argue, at the extreme, that the Internet will "cease to function" unless cable modem service providers are subject to Title II. EarthLink Br. 31 n.9. That is an odd claim to make about *maintaining* the status quo. Cable modem service has not to date been regulated as a telecommunications service, yet it—and the Internet as a whole—have prospered. See FCC Br. 29-30.

In any event, there is one important, underlying policy that respondents ignore. Respondents' essential argument is that cable modem service should be viewed as containing a separate telecommunications component, because that construction of the Act would allegedly increase competition by allowing independent ISPs to market their services to end users through the cable companies' facilities. But respondents' construction would achieve that result only by imposing substantial regulatory costs and disincentives on cable modem service providers. Such regulatory burdens could lead to higher prices and reduced investment in broadband deployment by cable operators, and hence to reduced consumer choice, particularly in rural or other underserved areas. See FCC Br. 31.

The FCC's goal, like that which respondents assert, is increased competition. But the Commission has determined that a truly competitive market is best achieved by encouraging "multiple electronic platforms" for broadband service, "including wireline, cable, terrestrial wireless and satellite."

Pet. App. 48a.[9] As the Commission explained, "[b]y promoting development and deployment of multiple platforms, we promote competition in the provision of broadband capabilities, ensuring that public demands and needs can be met." *Ibid.* The end result is a more competitive marketplace in which competing broadband providers have the incentive to invest in costly facilities and service enhancements so as to meet consumer needs and desires—including (if desired) the option to choose from multiple ISPs. That is the kind of choice that the FCC must be entitled to take into account in construing the Act, especially in a dynamic market that, far from respondents' dire predictions, has shown enormous growth under a hands-off regulatory regime.

B. The Commission's Forbearance Powers Do Not Require It To Classify All Services As Telecommunications Services

As the government's opening brief explains (Br. 29-32), the Commission's classification of cable modem service promotes the statutory policy of "encourag[ing] the deployment [of broadband services] on a reasonable and timely basis," 1996 Act § 706, 110 Stat. 153,[10] and the Commission's goal of creating a "minimal regulatory environment" that encourages broadband investment and innovation. Respondents assert that the Commission may pursue those objectives only by exercising its forbearance authority under Section 10

[9] Another emerging source that has already made its commercial debut is broadband over power lines. See generally *In re Availability of Advanced Telecommunications Capability*, 19 F.C.C.R. 20,540, 20,561 (2004).

[10] Respondents err in contending (EarthLink Br. 43, States Br. 39-40) that Section 706 has significance only for broadband technologies classified as telecommunications *services*. Congress's directive to "remove barriers to infrastructure investment" in order to promote "reasonable and timely" deployment, § 706(a), 110 Stat. 153, applies equally to all broadband technologies, without regard to the manner in which they are offered to consumers.

of the Act, 47 U.S.C. 160. EarthLink Br. 44; States Br. 32-33; MCI Br. 27-28.

Respondents err in contending that the Commission must construe all ambiguities in Title II so as to impose a greater regulatory burden on information service providers, which the Commission could then lift under Section 10. EarthLink Br. 44; see MCI Br. 28. That contention flies in the face of Congress's objective in adopting the 1996 Act. Rather than drafting an expansively regulatory statutory regime that the Commission could then ease under Section 10, Congress expressly sought through the 1996 Act to "*reduce regulation* in order to * * * encourage the rapid deployment of new telecommunications technologies." Preamble, 110 Stat. 56 (emphasis added). The Ninth Circuit's extension of Title II to cable modem service defies that legislative objective, and is not made permissible by the fact that the Commission may have power under Section 10 to lessen the harm of the judicial error.[11]

C. The Commission's Pending Proceeding On Application Of CALEA To Cable Modem Service Has No Bearing On This Case

Contrary to EarthLink's suggestion (Br. 49), the FCC's pending rulemaking proceeding under the Communications Assistance for Law Enforcement Act (CALEA), 47 U.S.C. 1001 *et seq.*, has no bearing on the reasonableness of the FCC's classification of cable modem service under the Communications Act. CALEA, which imposes requirements on "telecommunications carriers" to facilitate authorized electronic surveillance by law enforcement agencies, see 47

[11] *MCI Telecomm. Corp.* v. *AT&T*, 512 U.S. 218 (1994), on which respondents rely (EarthLink Br. 34-35), is inapposite. In *MCI*, the Court concluded that the Commission's authority to "modify" the Act's express tariff-filing requirements authorized only "moderate change," not "a fundamental revision of the statute." 512 U.S. at 228, 231. Here, by contrast, the Commission has not sought to change any arrangement codified in the Communications Act, but has simply applied the Act's definitions to determine the regulatory classification of cable modem service.

U.S.C. 1002, has its own distinct structure and purposes. CALEA has a significantly broader definition of "telecommunications carrier" than that in the Communications Act, which includes, *inter alia*, a service providing "a replacement for a substantial portion of the local telephone exchange service" if the "public interest" so requires—a provision with no express analogue in the Communications Act. See 47 U.S.C. 1001(8)(B)(ii). CALEA does not include the Communications Act's narrow definition of "telecommunications" or the mutually exclusive regulatory dichotomy of "telecommunications service" and "information service."

In August 2004—two years after the Commission's decision in this case—the FCC released a Notice of Proposed Rulemaking in which it tentatively concluded that, given CALEA's broader reach, all "facilities-based providers of any type of broadband Internet access, including * * * cable modem," are "subject to CALEA." *In re Communications Assistance for Law Enforcement Act & Broadband Access & Servs.*, 19 F.C.C.R. 15,676, 15,703 ¶ 47 (2004). The classification of cable modem service under CALEA will be addressed in that administrative context. With that proceeding pending, this Court should not address any interplay between CALEA and the Communications Act here.[12]

* * * * *

For the foregoing reasons and those stated in the opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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[12] Respondents concede (EarthLink Br. 49; States Br. 17 n.6) that this Court is not bound by the Ninth Circuit's refusal to apply *Chevron*, and they make no effort to defend the judgment below on that ground. As previously explained, however (FCC Br. 38-44), that erroneous rationale has pernicious consequences for administrative law, and it would be appropriate for this Court to address the issue in order to provide guidance to the courts of appeals.

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REPLY OF RESPONDENT IN SUPPORT OF PETITIONER

(22) (24)

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,

Petitioners,

- and -

FEDERAL COMMUNICATIONS COMMISSION
and UNITED STATES OF AMERICA,

Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF OF RESPONDENTS THE VERIZON TELEPHONE COMPANIES, GTE.NET LLC d/b/a VERIZON INTERNET SOLUTIONS, and VERIZON INTERNET SERVICES INC. IN SUPPORT OF REVERSAL

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STATEMENT PURSUANT TO RULE 29.6

Respondents' Rule 29.6 Statement was set forth at page *ii* and *iii* of Respondents' Opening Brief, and there are no amendments to that Statement.

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INTRODUCTION AND SUMMARY

Respondents and their supporting *amici* indulge an assumption that common carrier treatment of all privately owned transmission facilities is the norm. *See, e.g.*, Earthlink Br. 18-25; MCI Br. 30-38. In respondents' view, the FCC has a statutory obligation to ferret out the "pure transmission" component of any integrated service and convert it into the communications equivalent of an interstate highway. The opposite is true, and several provisions of the Communications Act of 1934 ("Communications Act" or "Act"), as amended by the Telecommunications Act of 1996 ("1996 Act"),[1] make that fact clear.

In reality, imposing government-compelled common carriage status on the transmission component of an integrated service offering is "radical surgery," historically undertaken only in very limited circumstances and based on specific legislative, administrative, or judicial findings. FCC Pet. 101a; FCC Reply 7-9. As an initial matter, a governmental decision to compel common carriage has always required a substantial evidentiary showing of necessity, grounded in the presence of market power and its actual or potential abuse.

In addition, the decision to subject *a portion of* an integrated service offering (*e.g.*, private information content services delivered over private transmission facilities) to common carriage obligations is an infinitely more extreme measure. That is so because imposing government-compelled access and price controls on the transmission component of these integrated services would sever control over private property otherwise intended to deliver the provider's own information content and content packaging services, which themselves are a form of speech.

Such a regulatory mandate forces the service provider to fundamentally alter the nature and content of the service — like converting a private movie theatre into a public forum for the display of any and all audiovisual productions. History

[1] Pub. L. No. 104-104, 110 Stat. 153.

thus makes respondents' legal burden of proof a heavy one. If the Congress that passed the 1996 Act had intended to expand common carrier duties, one would expect to find substantial evidence of such a dramatic shift in regulatory posture. There is none.

All of the relevant legislative indicia point in precisely the opposite direction: Congress did not decide whether the transmission component of cable modem service (or any other integrated service) must be separated out and offered on common carrier terms. Rather, it left that issue to be decided by the Commission (as it always had been in the past) under the traditional test for common carrier status. Both before and after the 1996 Act, that test has asked two questions: (a) has the service provider voluntarily made an indiscriminate offering of a stand-alone transmission service; or (b) despite the service provider's preferred business model, do the presence of market power, lack of alternative transmission facilities, and a cost-benefit analysis justify imposing price and access mandates that *create* a common carrier offering that did not exist before. *See* FCC Reply 7-9; *see also Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630, 642 (D.C. Cir. 1976) ("*NARUC I*"); *Cable & Wireless, PLC*, 12 F.C.C.R. 8516, 8521-22 (1997).

Respondents contend that the *Declaratory Ruling* sounds the death knell for Title II regulation because any service provider can "bundle" a pure transmission service with some minimal "information service" component, such as a time and date announcement before a traditional voice telephone call, and thereby "escape" common carrier regulation. MCI Br. 23; *see id.* at 22; Earthlink Br. 20-21; State & Consumer Groups Br. 17-23, 34. But the FCC has never suggested that such a minimalist approach is adequate to classify the entirety of the service as an integrated information service. And, of course, the two-part test for common carrier treatment, consistently applied by the Commission and the courts before and after the 1996 Act, precludes such a result in any event. A "bundle"

that is designed to disguise or exploit market power remains subject to FCC scrutiny for the presence and actual or potential abuse of market power, and if such can be proven, can be subject to regulatory obligations (up to and including common carrier mandates). *See* FCC Reply 8.

From this fallacious demise of all Title II regulation, respondents reason that *every* integrated service that includes a transmission component must be "stripped apart," with the transmission facilities dedicated to all comers by government dictate at cost-based rates. In essence, respondents contend that Congress silently used the otherwise innocuous definitional additions it made in 1996 to render compulsory common carriage status the default for every new delivery platform and every associated information content service, with the cumbersome and time-consuming forbearance remedy left as the only device to restore control to the facilities' owners. *See* Earthlink Br. 42-45; State & Consumer Groups Br. 33-34, 37; MCI Br. 28; AARP Br. 6.

The 1996 Act is a particularly odd home for respondents' "expanding universe" theory of common carriage. The 1996 Act was, after all, a *deregulatory* initiative, premised on Congress's determination that "natural monopolies" were a thing of the past. *See, e.g.*, S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement); *see also* H.R. Rep. No. 104-204, at 48 (1995) (1996 Act "open[ed] all communications services to competition" and "lift[ed] the shackles of monopoly regulation").

Respondents also make much of the so-called "mutual exclusivity" of "telecommunications services" and "information services," which they paint as the lynchpin of the *Declaratory Ruling*. *See* Earthlink Br. 37-39. While Congress's use of the phrase "via telecommunications" in the definition of an "information service" may or may not command "mutual exclusivity," neither does it prohibit it. Based upon its past conclusion that "enhanced services" and "basic services" were mutually exclusive, the Commission reasonably read the Act as according non-common carrier status to the transmission

facilities used by cable operators to deliver high-speed access to the Internet.

Unlike respondents' briefs and the decision below, the *Declaratory Ruling* properly applied the traditional test for common carriage to cable modem service. The FCC correctly found that there was no voluntary offering of indiscriminate access to the transmission component of cable modem service on a stand-alone basis, *see* FCC Pet. 95a-97a, and that the market for broadband Internet access services is robustly competitive, with multiple providers and technologies offering a "last mile" path to existing and potential subscribers, *see id.* at 49a-52a; *see also id.* at 100a-104a. In such circumstances, common carrier regulation is not only *not required* by the Act, but it is, as the United States recognizes, antithetical to the "crucial federal policy of encouraging the availability of broadband Internet access." FCC Br. 16; *see* FCC Pet. 104a; FCC Reply 18 & n.10.

Finally, many respondents attempt to use the principles of competitive and technological neutrality in the Act to extend the unjustified common carrier regulation of telephone company-provided DSL service onto the entire broadband market. Earthlink Br. 4, 25-26; State & Consumer Groups Br. 14-15, 43-45; MCI Br. 7, 20, 35-38. As Verizon has shown, the current regulation of DSL is a historical anomaly—one with no roots in careful analysis of the statutory definitions or present conditions in the separate broadband market. Verizon Br. 9, 28-33. Thus, Verizon has consistently maintained that the FCC must expeditiously establish a coherent and even-handed deregulatory regime for *all* broadband providers. For more than six years, DSL, a decidedly secondary player in a competitive market, has labored under the very regulation that the United States and the cable petitioners agree is unjustified, unnecessary, and harmful to the statutory goal of promoting investment in broadband facilities and services. FCC Br. 16, 30-32; NCTA Br. 29.

The only statutory flaw in the *Declaratory Ruling* was its decision to leave DSL saddled with the very regulation that the United States represents would have strangled cable

modem service in its infancy. *See* FCC Br. 16, 30-32. Congress clearly wanted the Commission to adopt a "hands off" policy for broadband services, *id.* at 30, but the statute requires that such a policy be pursued "without regard to any transmission media or technology," 1996 Act, § 706(c)(1), a principle that the United States acknowledges before this Court, FCC Reply 16, 18 n.10.

For these reasons, discussed in detail below, this Court should reject respondents' pleas, reverse the decision of the Ninth Circuit, and instruct the court of appeals to remand this docket to the FCC to expeditiously resolve the outstanding issue of the proper statutory classification and regulatory treatment of DSL and other broadband Internet access services that compete with cable modem service in light of this Court's decision.

ARGUMENT

I. The Communications Act Does Not Compel the FCC To Strip Out the Transmission Component of Broadband Internet Access and Subject It to Outdated Common Carrier Regulation.

A. The Definition of "Telecommunications Services" Does Not Contain the Sweeping and Mechanistic Rule of Common Carriage That Respondents Advocate.

Respondents and their supporting *amici* continuously repeat the mantra that cable modem service contains a "pure transmission" component and that the finished, integrated service is "offered to the public" as conclusive evidence that a portion of cable modem service must constitute a "telecommunications service" under the Communications Act. *See, e.g.*, Earthlink Br. 35-37, 39-40; State & Consumer Groups Br. 14-27; MCI Br. 15-21. This argument is wrong for at least five reasons.

First, respondents cannot prevail by showing that the Commission *could* classify the transmission component of cable modem service as a "telecommunications service." Rather, they must demonstrate that the FCC had no choice, *viz.* that it *must* classify part of cable modem service as a "telecommunications

service" because Congress has spoken directly to the issue and precluded the regulatory path taken by the agency. *E.g.*, *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984). Respondents can point to no statutory text or legislative history that even hints that Congress intended to preclude the Commission from treating the suite of functionalities offered by broadband Internet access as an integrated "information service," 47 U.S.C. § 153(20), and the transmission component as non-common carrier "telecommunications," *id.* § 153(43).

Respondents repeatedly invoke the rhetoric of antitrust law, speaking of anticompetitive "bundling" of services and incentives to discriminate against unaffiliated content providers. Earthlink Br. 15, 20-21, 23-25; State & Consumer Groups Br. 17-23; MCI Br. 22-24; NARUC Br. 11-18. But this is not a question of "bundling" different services. The question is whether a service provider can offer a single, finished Internet access service to its customers without having to disaggregate that service and make its component parts available to others on government-regulated terms. In any event, respondents' argument begs the question whether the Act allows this particular combination of high-speed transmission, proprietary content, email functionalities, and Internet access to be treated as an integrated service or whether the Act commands "unbundling" of content and transmission. Unfortunately for respondents, the statute itself answers these questions in the FCC's favor.

The statutory definition of "telecommunications" encompasses *all* pure transmission functions, including *both* non-common carrier offerings (or "private telecommunications") and common carrier services (or "telecommunications services"). *See* Verizon Br. 21-22. Respondents' proffered analysis improperly conflates the broader definition of "telecommunications" with the narrower definition of "telecommunications services" and would render the latter largely superfluous. *See id.*

In addition, the statutory definition of an "information service" contemplates a single, integrated service that consists of data storage and data manipulation functionalities *and* transmission accomplished *"via telecommunications."* 47 U.S.C. § 153(20) (emphasis added). The offering of the integrated service to the public, including the transmission component, cannot *ipso facto* transform the transmission component into a "telecommunications service." If it did, Congress's choice of the words "via telecommunications" would make no sense—the transmission component of every information service would be a "telecommunications service." But "telecommunications" has its own definition under the Act, 47 U.S.C. § 153(43), and Congress expressly eschewed placing the defined term "information service" in the definition of "telecommunications service," Verizon Br. 27-28; *see* FCC Br. 27 n.9; NCTA Br. 24; BellSouth Br. 18 n.3.[2] The fact that Congress used the term "telecommunications," rather than "telecommunication *service*," in the definition of "information service" demonstrates that the transmission component that underlies an "information service" offering can be *either* a common carrier "telecommunications service" or non-common carrier "telecommunications."[3]

[2] The State and Consumer Groups contend that Congress's decision to omit the term "information service" from the statutory definition of "telecommunications service" is irrelevant, arguing that it was based entirely upon jurisdictional concerns over universal service. State & Consumer Groups Br. 26. This is incorrect. Nothing in the legislative history indicates that concerns regarding universal service formed the basis for Congress's decision. The statement of a single Senator – the only evidence upon which the State and Consumer Groups rely for their theory – nowhere suggests that universal service concerns were the *only* (or even primary) reason for the legislative change. 141 Cong. Rec. S7996 (daily ed. June 8, 1995) (statement of Sen. Kerrey). Respondents cannot rewrite history: a prior draft of this very legislation said exactly what respondents claim the statute now means, but that portion of the definitional sections *was intentionally removed* in the legislative process. *Compare* S. Rep. No. 104-23, at 18, 79 (1995), *with* 47 U.S.C. § 153(46).

[3] Rather than respond to Verizon's statutory arguments on the merits, respondent Earthlink is reduced to selective quotation from Verizon's filings before the Commission. *See* Earthlink Br. 19-20. Contrary to Earthlink's mischaracterization, Verizon did not take "precisely the opposite position" (Cont'd)

Second, while respondents concede that the 1996 Act incorporated pre-existing precedent regarding what types of services are properly subject to common carrier obligations, *see* Earthlink Br. 21-26; MCI Br. 34-35, they completely ignore half of the test that applies under that precedent: the level of competition in the relevant market. The question whether a service is a common carrier "telecommunications service," and the related (and perhaps antecedent) question whether the Commission may force a carrier to divide out the transmission component of an integrated information service and offer that component separately pursuant to the so-called *Computer Rules*,[4] turn on the same market-based analysis. Absent a voluntary undertaking to provide indiscriminate access to the transmission component on a stand-alone basis to all who request it, both questions can be answered only after it is

(Cont'd)
before the FCC but, rather, has maintained before the agency, in the Ninth Circuit, and in this Court that the presence of robust competition in the broadband market precludes the placement of common carrier duties on *any* broadband service provider. *E.g.*, Reply Comments of Verizon Communications, GEN Docket No. 00-185, at 2 (filed at FCC Jan. 10, 2001), *at* http://gullfoss2.fcc.gov/prod/ecfs retrieve.cgi?native_or_pdf=pdf&id_document=6512358434 ("[I]f the Commission reaffirms its numerous past conclusions that the residential broadband access market is competitive, then *all* participants in that market should be *freed* from regulation.") (emphases in original); *see id.* at 3, 24, 25. Verizon has also consistently argued that the FCC cannot classify any one broadband provider in isolation because doing so contravenes principles of competitive and technological neutrality in the Communications Act, violates the First Amendment, and is arbitrary and capricious. *Id.* at 27-30.

[4] As a result of the *Computer Rules*, certain wireline telephone companies that provide information services over their traditional "narrowband" telephone lines, including Verizon, have historically been required, among other things, to offer the transmission component of their information services to all content providers pursuant to cost-based rates embodied in federal tariffs and to acquire transmission for their own information service offerings pursuant to tariff. *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 F.C.C.R. 3019, 3036-40 (2002) ("*Wireline Broadband NPRM*"); *see also* FCC Br. 30-32 (describing the economic and regulatory burdens under the *Computer Rules* and Title II of the Communications Act).

determined whether "the public interest . . . require[s] the carrier to be legally compelled to serve the public indifferently" because the carrier "has sufficient market power." *AT&T Submarine Sys. Inc.*, 13 F.C.C.R. 21,585, 21,588-89 (1998); *see Cable & Wireless*, 12 F.C.C.R. at 8521-22; *Virgin Islands Tel. Corp. v. FCC*, 198 F.3d 921, 924-25 (D.C. Cir. 1999); *NARUC I*, 525 F.2d at 642; *S.W. Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481, 1484 (D.C. Cir. 1994); *see also* Verizon Br. 23-25; FCC Reply 8-9.[5]

The FCC and the federal courts have consistently applied this test, based on the competitive state of the relevant market and the presence of existing or anticipated alternative transmission facilities, to determine whether the "radical surgery," FCC Pet. 101a, of requiring a carrier to separate out the transmission component of an integrated service and offer it on government-dictated price and access terms is necessary. And, as both the Commission and the D.C. Circuit have concluded, this test is perfectly consistent with the definitions added by the 1996 Act. *See* Verizon Br. 27.

In fact, the general rule, applicable both before and after the 1996 Act, is *directly contrary to* respondents' position. Absent "bottleneck" control over access to end-users, the FCC cannot compel any service provider to cede control over its delivery platform and to allow "all comers" to access the transmission component of an integrated service at cost-based tariffed rates. Respondents have no answer to the Commission's analysis of the competitive conditions in the broadband market, and so they simply feign ignorance as to the relevance of competition between alternative content providers and delivery systems.

[5] *See also Amendment of Section 64.702 of the Comm'n's Rules & Regulations*, 77 F.C.C.2d 384, 468-69 (1980) (subsequent history omitted) ("*Computer II*") (declining to extend *Computer Rules* to carriers where they "d[id] not have . . . market power" and thus would not be in a position to act anticompetitively); *id.* at 428-30 (finding that it would not serve the public interest to subject enhanced service providers to traditional common carrier regulation because, among other things, the market was "truly competitive"); FCC Reply 7-8.

Respondents ignore established criteria for imposing common carrier duties for the simple reason that the time-honored standards are fatal to their claims. *See* FCC Reply 7-10 (discussing "long-settled standards" for imposing common carrier obligations). Under the proper market-based analysis, the one conducted by the FCC in the order under review, there is no basis for imposing common carrier duties on any participant in the broadband market. As Verizon demonstrated in its opening brief, Verizon Br. 26, 28, 31, and as the Commission has repeatedly found, there is no market problem that needs "fixing" because the broadband market is vibrantly competitive and growing only more so each day, *see id.* at 2 & n.2, 10, 26; *see also, e.g., United States Telecom Ass'n v. FCC*, 359 F.3d 554, 582 (D.C. Cir.), *cert. denied*, 125 S. Ct. 313 (2004); *United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002), *cert. denied*, 538 U.S. 940 (2003).[6]

While respondents advance a perfunctory argument that the 1996 Act's service definitions mandate common carrier status for all facilities-based information service providers, *see, e.g.*, Earthlink Br. 22-25, 46-47; State & Consumer Groups Br. 47-48; MCI Br. 36-37, nothing in the text or legislative history suggests that Congress wished to codify (let alone expand) the burdensome common carriage mandates of the *Computer Rules*. It is clear that the definitions of "telecommunications service" and "information service" contained in the statute parallel the concepts of "common carriage" and "enhanced services" as developed and applied prior to the enactment of the 1996 Act. *Cable & Wireless*, 12 F.C.C.R. at 8521-22; *Virgin Islands Tel.*, 198 F.3d at 926-27. The legislative history of the

[6] Certain respondents and *amici* attempt to demonstrate that the broadband market is not in fact competitive. *See* Earthlink Br. 15; ACLU Br. 8-11, 13-16; AARP Br. 9-16. This argument conflicts with literally dozens of findings by the FCC as well as two well-reasoned decisions of the D.C. Circuit. *See* Verizon Br. 2 & n.2, 10, 26. There are numerous existing and potential platforms over which broadband services can be provided, including cable modem, DSL, fiber, fixed wireless, 3G mobile wireless, broadband over powerlines, and satellite broadband services. *See id.*; *see also, e.g., Wireless Broadband Access Task Force Report*, GEN Docket No. 04-163, at 2-4, 12 (rel. Mar. 8, 2005), *at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-257247A1.pdf; *Availability of Advanced Telecomms. Capability in the United States*, 19 F.C.C.R. 20,540, 2004 FCC LEXIS 5157, at *2, *12, *13-*44 (2004).

1996 Act also demonstrates that the definition of telecommunications service "recognize[s] the distinction between common carrier offerings . . . and private services." H.R. Conf. Rep. No. 104-458, at 115 (1996).[7]

It is equally clear, however, that Congress *did not* dictate which services fall within each category but, rather, "intend[ed] that the Commission would have the continued flexibility to modify its definition and rules pertaining to enhanced services as technology changes." H.R. Conf. Rep. No. 104-458, at 115 (1996). In the face of this pronouncement, respondents' assertion that Congress meant to freeze in place—and, indeed, to extend to new technologies—the regulatory regime that the *Computer Rules* established for the narrowband world of the 1970s and 1980s is preposterous.[8]

Respondents' arguments dwindle to nothing when placed against the larger statutory picture, *e.g.*, when the background and purpose of the 1996 Act are juxtaposed against the unique origins and limited scope of the FCC's *Computer Rules*. As to advanced services such as broadband Internet access,

[7] State and Consumer Groups' unexplained pronouncement that "the distinction between private and common carriage is not relevant to whether cable modem service is subject to regulation," State & Consumer Groups Br. 25 n.9, has no merit. "Telecommunications services" are subject to Title II regulation while "telecommunications" offerings are regulated, if at all, pursuant to Title I. Thus, the distinction between private and common carriage lies at the very heart of this case.

[8] At the same time, the suggestion made by the United States and the cable petitioners that the *Computer Rules* are automatically inapplicable here simply because they have never before applied to "cable companies" (whatever that means) is incorrect, *see* FCC Br. 17, 36; NCTA Br. 28-29; FCC Reply 10-14, as the United States effectively concedes elsewhere in its reply brief, *see* FCC Reply 16, 18 n.10. Cable operators have entered a new market for the facilities-based delivery of information services (along with cable services and voice telephony). Saying that "[c]able operators have not traditionally been regulated as common carriers," *id.* at 12, is an empty truism. Services (and hence at least initial regulatory classification) are defined by the functionalities delivered, not the corporate identity of the provider. The fact that the *Computer Rules* have never been applied to cable operators states the question presented to the FCC, not the answer. The answer depends on whether cable operators enjoy such market power over high-speed Internet access (or any part of it) that they must, in the public interest, be subject to unbundling of transmission and common carriage obligations.

the thrust of the 1996 Act is decidedly deregulatory. *See, e.g.*, 1996 Act, § 706; 47 U.S.C. § 230(b); S. Conf. Rep. No. 104-230, at 1 (1996) (Joint Explanatory Statement); H.R. Conf. Rep. No. 104-458, at 1 (1996) (Joint Explanatory Statement). The *Computer Rules*, by contrast, were intended to address *de jure* or *de facto* monopoly control over narrowband telephone lines—at that time the only source of transmission for data and computing services. *See* Verizon Br. 23-25; *see also* FCC Pet. 89a-90a n.139 (*Computer Rules* were directed at "bottleneck common carrier facilities"); *Computer II*, 77 F.C.C.2d at 466-68 (stressing importance of a carrier's monopoly control of local bottleneck facilities and the ability to abuse that control to its decision to require compliance with *Computer Rules*). At the time the *Computer Rules* were adopted, there was only "one wire" into the home—that of the local telephone company. *See* FCC Br. 35 n.15; FCC Reply 7-8.

Third, the chilling effect that common carrier requirements would have on the capital investment that the 1996 Act was intended to promote renders respondents' reading of the definitional sections of the Act all the more untenable. Section 230 of the Communications Act recognizes that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation," 47 U.S.C. § 230(a)(4), and, accordingly, sets forth the "policy of the United States . . . to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation," *id.* § 230(b)(1)-(2).

Similarly, Section 706 of the 1996 Act requires the FCC and the states to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans" by, among other things, "utilizing . . . regulatory forbearance, measures that promote competition," and other "methods that remove barriers to infrastructure investment." 1996 Act, § 706(a)-(b). Where, as here, common carrier duties impede continued investment in and deployment

of new technologies, *see* Verizon Br. 29-31—a sentiment with which both the United States and NCTA agree, *see* FCC Br. 30-31; FCC Reply 17-18; NCTA Br. 29—these statutory pronouncements preclude the result that respondents seek.[9]

Fourth, in reality nearly every communications service contains some "pure transmission" or "delivery" component within it. Broadcasters and satellite television providers use parts of the electromagnetic spectrum to deliver programming without change in its form or content. Cable operators use hybrid fiber and coaxial cable systems to transmit programming to subscribers and to receive requests for programming. Internet and other information service providers typically supply at least some of the transmission necessary to allow their customers to access websites and databases across the country and around the world. Telephone companies such as Verizon are spending billions of dollars on next-generation transmission facilities (including digital switches and fiber-to-the-premises) to deliver a package of content and communications services, including video programming services, video-on-demand, proprietary data

[9] Respondents' contention that Section 706 evinces a backdoor Congressional intent to classify broadband Internet access services as "telecommunications services" because the "regulating methods" that it directs the FCC and the states to use to promote broadband largely apply to "telecommunications services" is absurd. *See* Earthlink Br. 43; State & Consumer Groups Br. 31-34, 39-41. First, nothing in Section 706 suggests that it was intended to alter the threshold test for properly classifying services or that it is the sole means by which the FCC can and should promote broadband. *See infra* pp. 16-17. Rather, Section 706 provides an additional tool by which the Commission may exempt services from regulatory burdens that might otherwise apply. Second, on its face, Section 706 authorizes the use of "other regulating methods that remove barriers to infrastructure investment," which are not limited to "telecommunications services." 1996 Act, § 706(a). Finally, Section 706 utilizes the term "telecommunications service" *only* in defining the state regulatory bodies with responsibilities under the statute, *id.*, and uses the separately (and more broadly) defined term "advanced telecommunications capability," which itself is defined as including "telecommunications" (rather than the narrower category of "telecommunications service") to describe the services that the statute covers, *id.* § 706(c)(1). When Congress uses "different words" it intends that they have "different meanings." *United States v. Bean*, 537 U.S. 71, 75 n.4 (2002).

services, security and home management services, and high-speed Internet access.

No one would suggest that all of these services include separate "telecommunications service" components that must be offered on common carrier terms simply because they rely on transmission to offer an integrated service to the public. Indeed, for decades the Commission has treated many "pure transmission" services as non-common carrier services, *see* Verizon Br. 24 n.9 (collecting authorities), and the Congress that passed the 1996 Act was well aware of this category of private carriage and presumably wished to preserve it, *see id.* at 23.[10]

Finally, a wooden rule forcing the separation of editorial content from transmission facilities built to deliver that content presents serious First Amendment issues. This Court has narrowly approved the imposition of "must carry" obligations on private communications facilities that provide editorial content only where there is a fulsome record documenting market power and the abuse of that power, *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 196-204 (1997); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 661 (1994), and no court has ever upheld such requirements for the competitive broadband services at issue in this case. The presence of competition in the burgeoning broadband market precludes such a finding here and renders the imposition of a mandatory access regime unjustifiable under any test.

[10] To the extent that respondents seek to rely upon matters of policy preference rather than statutory construction, *see, e.g.*, Earthlink Br. 28-29 (common carrier treatment is necessary for "consumers . . . to receive the benefit of information services provided by anyone other than the owners of transmission networks"), they commit the same error as Judge Thomas in his concurrence below, *see* FCC Pet. 34a (common carrier treatment "would enhance independent ISP access to telecommunications facilities, almost certainly increasing consumer choice").

B. The Debate over the "Mutual Exclusivity" of "Telecommunications Services" and "Information Services" Need Not Be Resolved in This Case.

Respondents make much of their disagreement with the FCC's position that "telecommunications services" and "information services" are "mutually exclusive." Earthlink Br. 37-39. This is a red herring. The Commission did not base its classification decision on this legal conclusion and it is, as a logical matter, irrelevant to the proper statutory classification of broadband Internet access.

In fact, the FCC's observation that "telecommunications services" and "information services" were "mutually exclusive" was entirely consistent with the Commission's prior precedent distinguishing between "basic" and "enhanced" services. *See Federal-State Joint Bd. on Universal Serv.*, 13 F.C.C.R. 11,501, 11,507-08, 11,524 (1998). Because, as respondents concede, the definitions at issue at least "parallel" the definitions that the FCC had developed prior to the 1996 Act, Earthlink Br. 23; *see* MCI Br. 34-35, even under their theory the statutory definitions can reasonably be interpreted in a manner consistent with the Commission's pre-existing precedent, *see* FCC Br. 22.

The key point, and one that respondents do not even attempt to refute, is the one discussed above and in Verizon's opening brief, *see supra* pp. 6-14, Verizon Br. 23-28—there simply is no indication that Congress intended to require the transmission component of all information services to be stripped out and offered on a common carrier basis regardless of the market power analysis. Thus, it was for the FCC to determine, using its past precedent establishing market power and its actual or potential abuse as the justification for imposing common carrier duties, whether such "radical surgery" is required in the broadband market. The Commission properly found that the competitive state of the broadband market precluded the exercise of market power by any player and that, thus, imposing common carrier duties was not in the public interest. FCC Pet. 102a-104a (waiving

application of *Computer Rules* to cable modem service); *id.* at 109a-114a (finding that, even where cable operators might offer broadband transmission service separately, there was no reason to compel the offering of such service on a common carrier basis).

II. The Existence of Forbearance Authority Cannot Create Any Inference That the 1996 Act Radically Expanded Common Carrier Treatment.

The fact that the FCC might remove common carrier regulations through the alternative legal paths left open by *Brand X* does nothing to undermine the Commission's initial classification of cable modem service as a non-common carriage offering. It is true that the FCC could determine that broadband providers offer transmission to Internet service providers on a "private carriage" basis, or it could, through formal waiver or forbearance proceedings, eliminate any common carrier regulations that might otherwise apply. *See* FCC Pet. 22a n.14; *id.* at 34a-35a (Thomas, J., concurring). But respondents are flatly wrong that forbearance is the only permissible means by which the Commission may proceed. *See* Earthlink Br. 42-45; State & Consumer Groups Br. 33-34, 37; MCI Br. 28; AARP Br. 6.

This is true primarily because the question as to how a service is classified is the proverbial *first step* under the Communications Act's regulatory scheme. *See* Verizon Br. 5-6; FCC Pet. 9a, 133a; *see also* Earthlink Br. 27, 30-31; MCI Br. 5, 18; *cf. Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 355-56 (2002) (Thomas, J., concurring in part, dissenting in part). If the service is properly classified as a non-common carrier offering at this first step of the analysis, then resort to a burdensome and potentially lengthy forbearance or waiver process is not necessary.

Respondents' assertion that Congress decided that any service that contains a "pure transmission" component and is ultimately offered to the public must initially face onerous common carrier regulation is exactly backwards. New technologies and new content services are being deployed every day, and it is in the initial development and deployment phases that the *absence of* regulatory constraint is

critical to success. Under respondents' view, burdensome common carrier regulation adheres to every new information content delivery system until the FCC can remove it through cumbersome and time-consuming forbearance proceedings. Congress did not intend the forbearance provision of the 1996 Act to soften the blow of a statutory expansion of traditional regulation. Rather, Congress meant to allow the Commission to continue the work of dismantling the legacy regime developed for monopoly market conditions—work that Congress commenced in the 1996 Act. *Cf. Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1032-33, *reh'g granted on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

III. Respondents' Heavy Reliance on the Anomalous Regulatory Treatment of DSL Is Misplaced.

Respondents rely heavily on the FCC's prior decisions treating DSL as a common carrier service to support their argument that the transmission component of cable modem service should be classified as a "telecommunications service." *See* Earthlink Br. 4, 25-26; State & Consumer Groups Br. 14-15; MCI Br. 7, 20, 35-38; FCC Pet. 31a-32a (Thomas, J., concurring); Verizon Resp. 16a; *see also* FCC Br. 17, 36; NCTA Br. 28-29. Their reliance is misplaced.

To be sure, and as respondents correctly recognize, the Act does require that functionally equivalent services are classified (and, ultimately, regulated) in a competitively and technologically neutral fashion. *See* Earthlink Br. 4, 25-26; State & Consumer Groups Br. 14-15, 43-45; MCI Br. 7, 20, 35-38. Indeed, the United States recognizes that a service must be defined by the functionalities it offers end users, not corporate identity or the nature of the technology used. *See* FCC Br. 23 (The classification of a service under the Act "must be resolved by reference to the nature of the provider's 'offering . . . to the public,' 47 U.S.C. § 153(46), and thus the classification 'turns on the nature of the functions that the end user is offered.'") (quoting FCC Pet. 94a); FCC Pet. 90a ("None of the [relevant] statutory definitions rests on the particular type of facilities used. Rather, each rests on the function that is made available."); *see also* FCC Reply 16.

However, the fact that competitive neutrality must be achieved requires reversal, not affirmance, of the *per curiam* decision below. As Verizon has shown, the Commission's decisions regarding DSL were not supported by any statutory or market analysis at all, but instead involved the reflexive extension of common carrier obligations based on the corporate identity of the provider. Verizon Br. 9. In any event, the FCC has initiated proceedings to adjust the regulatory framework that applies to telephone company-provided broadband services. *See Wireline Broadband NPRM*, 17 F.C.C.R. at 3020-21, 3024-29; *Review of Regulatory Requirements for Incumbent LEC Broadband Telecomms. Servs.*, 16 F.C.C.R. 22,745, 22,746-49 (2001).

Moreover, given the competitive state of the broadband market, the only lawful result under the Commission's established criteria is to remove the obligations that apply to DSL, not to extend those requirements further into the competitive broadband market. Imposing common carrier duties, particularly on the distant second player in a competitive market, serves only to impede competition and discourage the very investment in advanced services that the FCC has a statutory duty to promote. *See* 1996 Act, § 706; 47 U.S.C. § 230. Indeed, the United States itself explains that "[r]egulating cable modem service as a telecommunications service would dramatically alter the regulatory environment that has fostered . . . investment and growth." FCC Br. 30; *see id.* at 30-31 & nn.11-12; FCC Reply 17-18; *see also* NCTA Br. 29. Accordingly, common carrier treatment of *any* provider in the competitive broadband market cannot be sustained.

The plain fact is that continuing to treat DSL providers as common carriers violates the Communications Act and FCC and federal court precedent regarding the proper criteria for imposing such duties, is inconsistent with the Commission's own findings in the *Declaratory Ruling* and elsewhere regarding the competitive nature of the separate broadband market, and is arbitrary and capricious on its face in light of the decision *not* to impose any regulatory obligations on cable modem service. Accordingly, the unlawful treatment of DSL, which

the FCC is now in the process of correcting, cannot support the tortured reading of the service definitions advocated by respondents and adopted by the Ninth Circuit.

Because the Ninth Circuit erroneously relied on the Commission's unlawful treatment of DSL, and because the FCC never addressed the question of regulatory parity, a remand remains necessary in this proceeding. Verizon again asks that this Court direct that Verizon's petition for review be remanded directly to the agency and that the Commission be directed to use this Court's guidance to *expeditiously* arrive at a proper statutory classification of DSL services. The FCC has a legal obligation to at least address Verizon's arguments, properly preserved before the Commission and the Ninth Circuit, *viz.* that the Communications Act, the First Amendment, and the Administrative Procedure Act command that regulatory burdens that result from the statutory classification of the services at issue be imposed without regard to corporate identity or delivery technology. The present regulatory schism in the broadband market is indefensible and is a cause of ongoing competitive and consumer harms.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's *per curiam* decision should be vacated and remanded to that court with instructions to remand the case directly to the FCC to expeditiously address the issues raised in Verizon's petition for review.

Respectfully submitted,

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Nos. 04-277 & 04-281

IN THE
SUPREME COURT OF THE UNITED STATES

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

-and-

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP, FREE PRESS and NATIONAL INTERNET ALLIANCE IN SUPPORT OF AFFIRMANCE

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Nos. 04-277 & 04-281

IN THE
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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
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-and-

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICI CURIAE* OF AARP, FREE PRESS and NATIONAL INTERNET ALLIANCE IN SUPPORT OF AFFIRMANCE

INTEREST OF *AMICI CURIAE*[1]

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[1] No counsel for any party authored any portion of this brief. No persons other than the *amici curiae*, its members, or its counsel made a monetary contribution to

AARP is a non-profit, non-partisan membership organization with more than 35 million members representing the interests of Americans aged 50 or older. AARP helps people 50 and older have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. Older Americans derive significant benefits from Internet access and usage. The Internet facilitates life-long learning opportunities and increased civic participation, particularly for those who have jobs, limited mobility, or family responsibilities that may make it difficult to participate in such activities otherwise. While the decision in this case will affect how all Americans access the Internet, Internet service provider ("ISP") competition is particularly important to AARP members because it will keep prices down and foster better customer service and applications targeted towards older Americans.

Free Press is a national, non-partisan organization working to increase informed public participation in crucial media policy debates, and to generate policies that will produce a more competitive and public interest-oriented media system with a strong non-profit and commercial sector. Therefore, preserving non-discriminatory access to the Internet is particularly important to Free Press's goals of ensuring public participation and access in the development of new media sectors.

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the preparation and submission of this brief. Amici has filed with the clerk a letter of consent from Petitioners, FCC and US. The remaining Petitioners and Respondents have filed with the Clerk notice of consent to the filing of amicus briefs.

The National Internet Alliance ("NIA") and its member organizations, the Federation of Internet Solution Providers ("FISPA"), the California ISP Association ("CISPA"), and the New Mexico Internet Provider Association ("NMIPA") support competition in all aspects of Internet services. These member organizations represent independent ISPs in over thirty states. The NIA believes that competition between Internet service providers breeds superior customer service and technological innovation to better serve all users. The decision in this case will determine the competitiveness of the market for ISP service over broadband and therefore directly implicates the NIA's goals of customer service and innovation.

SUMMARY OF ARGUMENT

This is a case about choice: whether ordinary Americans will have a choice in how they use the Internet, and the choice of the Federal Communications Commission ("FCC") in deciding whether to support or stymie those uses. In 2005, Americans use the Internet in myriad ways – communicating with long-lost friends and long-distance relatives, voicing their opinion on every topic from national politics (www.dailykos.com) to movies (www.imdb.com), and of course, shopping for every item imaginable (www.ebay.com). Technology is now available that allows people to talk to each other over the Internet, called voice over Internet protocol or VoIP. And we can expect future innovations that capitalize on the power of the Internet as a communications tool.

By miscategorizing cable broadband as entirely an information service and not recognizing its underlying telecommunications service, the FCC threatens the vibrant and competitive Internet service provider industry, which

makes it possible for Americans to do all of these things, and to look forward to even better uses of the network in the future. If the FCC's ruling stands, Americans will lose the critical choice of what ISP to use to connect them to the Internet. Because ISPs can control the applications and software customers use to access the Internet, absence of choice in ISPs will, in turn, limit what we can do once online.

The 1934 Communications Act established the Federal Communications Commission ("FCC") because Congress recognized that the providers of phone and radio service could control the way Americans communicate with one another and transact commerce across the nation. Against a historical backdrop of non-discriminatory access to the channels of communication and commerce, Congress charged the FCC with a statutory duty to promote public policy interests when promulgating communications regulation. The problem is that the FCC has conflated the transmission services that connect consumers to the Internet with the Internet access services that are provided over that transmission. Companies that own the technology over which data travels are "pipeline providers." They provide the highway on which Internet information travels. "Internet Service Providers" or "ISPs" are companies that provide users with the Internet applications that allow customers to use the Internet such as with browsing software and email programs. These are distinct services. But companies such as Comcast, who own the cable lines, can also require customers to use their Internet Service Providers as well. Forcing consumers to buy service from cable-affiliated ISPs restricts choice for consumers and creates a substantial competitive barrier for unaffiliated ISPs.

In the case of regulating cable broadband – a modern descendant of the railroads, phone lines, and radio service –

preserving the consumer's choice of Internet service provider promotes competition in the medium. The expansion of choice and competition drives down prices, provides for better service, encourages rapid innovation, and fosters more vibrant online communities. Currently, there is less and less competition among ISPs over the cable broadband medium.

Properly categorizing cable broadband as a telecommunications service gives the FCC a presumption of regulation that requires full consideration of these important public interests and the ability to regulate when necessary to reverse these troubling trends, as Congress intended.

ARGUMENT

Congress mandated the FCC to regulate communications industries in the best interest of consumers. *See* 47 U.S.C. § 151 (2000); 47 U.S.C. § 257(b) (2000). Without some intervention to promote competition, current and potential consumers of cable broadband will suffer from higher prices, poorer service, and less or no access to new, innovative uses of the Internet. These are dangerous harms that the cable industry's market power over the broadband pipeline engenders.

I. CONGRESS REQUIRES THE FCC TO CONSIDER THE INTERESTS OF CONSUMERS AND THE BENEFITS THEY DERIVE FROM NON-DISCRIMINATORY ACCESS WHEN PROMULGATING COMMUNICATIONS REGULATION.

The FCC has a statutory duty to promote consumer interests in regulating national communication. Congress commissioned the FCC to protect consumers of

communications industry services. In 1934, it created the FCC to regulate "interstate and foreign commerce by wire and radio so as to make available . . . to all the people of the United States, without discrimination . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges." 47 U.S.C. § 151 (2000). The 1996 Telecommunications Act reaffirmed this commitment, requiring the FCC "to promote the policies and purposes of this Act favoring . . . vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." 47 U.S.C. § 257(b) (2000). Even in considering when to relax regulation of telecommunications services, the paramount consideration is to be the public interest. *See* 47 U.S.C. § 160 (2000). Thus, Congress explicitly requires the FCC to consider and promote the important interests of consumers – managing prices, increasing access, and promoting innovation.

The public interest standard of the 1996 Act imposes a substantial duty on the FCC to develop a factual record on issues of public or consumer interest and regulate based on rules and criteria. Congress requires the development of extensive findings in order to forbear from regulating. 47 U.S.C. § 160(d) (2000). The Commission must determine that regulation is not necessary to ensure that the charges and practices of the industry are reasonable and not discriminatory, that regulation is not necessary to protect consumer interests, and that forbearing from regulation is consistent with the public interest. *Id.* Only this forbearance process gives the interests of individual consumers their just due. Thus, the FCC only gives proper consideration to the individual consumer by properly classifying broadband pipeline access as a telecommunications service. By

misclassifying cable modem service, the FCC has failed to conduct this important public interest analysis.

II. CONSUMERS REAP SIGNIFICANT BENEFITS WHEN GIVEN A DIVERSITY OF ISP CHOICES, AND CABLE BROADBAND'S INCREASING CONTROL OVER ISP CHOICE THREATENS THESE BENEFITS.

Because ISPs serve as a gateway or entrance to the Internet for their consumers, they serve a particularly important function. Certainly, preserving ISP choice over the cable broadband medium fosters competitive pricing and better, more tailored customer service. But it also protects the conditions for rapid technological innovation by preventing dominant pipeline access providers from discriminating against new and better uses for the network.

As this Court recognized as early as 1997, the Internet "allows tens of millions of people to communicate with one another and to access vast amounts of information from around the world. [It] is a unique and wholly new medium of worldwide human communication." *Reno v. A.C.L.U.*, 521 U.S. 844, 850 (1997) (citations omitted). "It is . . . both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services." *Id.* at 853. Consumers can use the Internet's "general purpose" technology in an almost infinite number of ways. Lee W. McKnight, *Internet Business Models: Creative Destruction as Usual*, in *Creative Destruction: Business Survival Strategies in the Global Internet Economy* (Lee W. McKnight et al. eds., 2001), at 39, 45. The ISP opens this world up to its users by providing a gateway to the Internet over which Internet information flows. The ISP can provide the array of computer programs that people use to go online,

to send messages to each other, to view the webpages that they want to see or create webpages themselves, to watch videos or listen to music, and to buy goods and services over the Internet.

Cable companies can control ISP choice because they provide broadband pipelines to subscribers. Often, these companies are a consumer's only choice of a pipeline to access the Internet. The cable company can then force the consumer to pay for its affiliated Internet service (ISP) option. Because the current FCC ruling fails to recognize the common carrier obligations of cable broadband providers to carry multiple ISPs, the pipeline providers can decide which ISPs they will carry over their lines and under what conditions. In this way, their position is like a highway that can decide to allow Fed-Ex trucks on its roads but not allow UPS trucks, or to require a customer to pay for Fed-Ex even if the customer prefers UPS.

A. ISPs Perform the Absolutely Critical Role of Bringing Information to Internet Users in Usable Form.

Internet service providers are critically important to the way users experience the Internet. The ISP is a consumer's door into the Internet. For example, when a person subscribes to an Internet service, the company might send the user an easy installation kit designed to make the connection process work seamlessly. If a customer has problems installing the service, he could call or email an individual customer service representative, or chat online with someone who can walk him through the installation process. Once online, an ISP might feature numerous "tutorials" for new users, including instructions on such topics as transferring files over the Internet and designing

one's own personal webpage. The service could include computer programs to limit spam (unwanted mass e-mailings) and pop-ups (annoying advertisements that often open automatically when you go to particular websites, thereby forcing the user to look at them because they obscure the actual content the user wants to see). Most independent ISPs now provide live, local technical support, which may include anything from helping customers connect to the Internet to helping them get rid of viruses to even assisting in problems with unaffiliated computer programs. In addition, many non-affiliated ISPs provide classes and training, particular for older consumers and other new entrants to the Internet. Local ISPs often also provide on-site support and training to customers requiring assistance, but who may be housebound or disabled. Thus, the ISP can make the world of the Internet accessible to the ordinary user, helping the user take advantage of the tremendous opportunities for communication and expression that the Internet affords.

Users unfamiliar with Internet technology derive a particular benefit from ISP choice because they rely more heavily on the ISP to "translate," explain, or demystify the capabilities of the Internet than technically savvy users. Thus, for older Americans, who did not grow up with the personal computer and the Internet as a part of their daily lives, the ISP serves a particularly important role when they first begin to access information online.

B. Market Dominant Cable Broadband Access Services Permitted to Close Out ISPs and Internet Traffic Threaten to Reverse the Trends of Lower Costs, Better and More Tailored Customer Service, and Rapid Innovation That Have Characterized the Internet Thus Far.

A vibrant ISP market breeds lower cost, promotes better and more personal service and spurs technological innovation. As the ISP market shrinks, these benefits rapidly evaporate.

1. Cable pipeline providers have great power to limit customer choice in Internet service providers and applications.

As broadband becomes more and more dominant, cable owners increasingly control the lines of communication upon which customers depend. They possess tremendous power to limit ISP choice. Historically, the federal courts have recognized the inherent power of those who control lines of communication. *See, e.g., United States v. Western Electric*, 673 F. Supp. 525, 566 (D.D.C. 1987) (noting that "[a]mong [a phone company's] more obvious means of anti-competition action . . . are . . . manipulation of the quality of access lines, impairment of the speed, quality, and efficiency of dedicated private lines used by competitors, development of new information services to take advantage of planned but not yet publicly known, changes in the underlying network, [and other behaviors]."). [2] Because of these inherent dangers, phone companies were required to sell transmissions to all ISPs, but the FCC has inexplicably abdicated that same line of reasoning when it comes to cable broadband.

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[2] The principal holding of this case was superseded by statute. *Stewart v. Nynex Corp.*, 78 F. Supp. 2d 172 (S.D.N.Y. 1999).

The FCC ruling allows companies to refuse to carry any ISP but their own, denying customers the right to choose or forcing consumers to pay for two ISPs to get the one they want. Most companies that provide access to the Internet over cable broadband are in two conceptually and physically separable businesses: they provide access to their pipeline to paying subscribers, and they operate ISPs over those lines. Conceptually, cable companies use their physical control over the lines to dominate the ISP market. FCC prior rulings "drew a distinction between bottleneck common carrier facilities and services for the transmission or movement of information on the one hand and, on the other, the use of computer processing applications to act on the content, code, protocol, or other aspects of the subscriber's information. The latter are "enhanced" or "information services." *High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4820 n.139 (2002) (declaratory ruling). By drawing a distinction between the "services for transmission" and the "computer processing applications," the FCC implicitly recognized the fundamental difference between cable broadband companies' telecommunications businesses (providing services for transmission of information) and its information service business (providing computer processing applications through its own or any affiliated ISPs). Without non-discriminatory access between service providers, cable providers not only control the means of delivering Internet content (the wire or cable), they also control the means of experiencing Internet content (the applications and user interfaces of the ISP) and the content itself.

Also, cable companies can direct users towards their own ISP service by making use of a non-affiliated ISP more expensive. For example, to use the America Online ("AOL") ISP over Comcast's broadband pipeline, a user would have to

pay both the 35 to 40 dollar monthly Comcast fee (which includes its own ISP service) and a fifteen-dollar monthly AOL fee just for the alternate Internet service. *See What Dial-Up and Broadband Plans Does AOL Offer?*, http://www.aol.com/support/index.adp?toc=billing&page=02 (last visited Feb. 10, 2005). Choosing a non-affiliated provider, in this example, increases costs by 38%.

Cable companies can also select which services users are allowed to use on the Internet. For example, a cable trade newspaper discussing pipeline technology notes that, "overload or misbehavior within the HFC [high frequency cable] network by any given provider must be contained within the network resources committed to that service provider – and not be allowed to impact other providers sharing the network." RiverDelta Networks, *QoS: One HFC Network, Multiple Revenue Streams*, in *Cable Datacom News*, *at* http://www.cabledatacomnews.com/whitepapers/paper08.html (last visited Feb. 5, 2005). While a cable pipeline provider might use that technology to prevent "overload or misbehavior," it can also use it to impair a service that uses a lot of data (for example, watching movies or downloading music over the Internet). For example, in 1999, ATT's then head of cable operations. Daniel Somers, expressed reluctance to allow other service providers to freely transmit movies via ATT's cable broadband services. David Lieberman, *Media Giants' Net Change: Major Companies Establish Strong Foothold Online*, USA Today, Dec. 14, 1999, at 3B. Cable companies can exclude certain services if the company does not want them delivered for any reason.

In the current market, most consumers have few choices in pipeline providers, which in turn limits their choice of ISP. Over 36% of zip codes have fewer than three

high-speed pipeline providers. Press Release, Federal Communications Commission, *Federal Communications Commission Releases Data on High-Speed Services for Internet Access* 18 (Dec. 22, 2004), *available at* http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd0603.pdf. Most cable companies require customers to pay for their affiliated ISP. Over the dial-up Internet, there were roughly fifteen ISPs per 100,000 customers. Consumer Federation of America, *Public Interest in Open Communication Networks* 67. On the high-speed Internet, there are now fewer than two ISPs per 100,000 customers. *Id.* Over cable broadband, there is less than one ISP per 100,000 customers. *Id.* Over the last six years, more than half of American ISPs have been either forced to close their doors or file for bankruptcy. Consumer Federation of America, *Public Interest in Open Communication Networks* 55; *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Reply Comments of Teletruth and the New Networks Institute 20 (2004), http://www.teletruth.org/docs/706Dataqualityactreplycomments.pdf.

2. While consumers enjoyed fierce price competition among Internet service providers before broadband, price competition over the broadband channel has been practically non-existent.

Consumers view price as a key factor in ISP choice. For example, between the late 1980s and late 1990s, the number of ISPs nationally increased from less than 1,000 to

approximately 7500. Consumer Federation of America, *Public Interest in Open Communication Networks* 55. As ISP competition spread, a wide range of pricing options developed, ranging from five to ten dollars for very basic service to twenty-five dollars per month for a full range of services.

Today, cable companies control approximately 62% of the residential high-speed Internet market. Federal Communications Commission, *High-Speed Services for Internet Access: Status as of June 30, 2004*, at Table 3. Cable companies also control 83% of advanced services lines. *Id.* at Table 4. Broadband use surpassed dial-up access in late 2004. Bob Tedeschi, *Shopping Sites Offer New Features for High-Speed Users and Get Surprisingly Few Complaints From Dial-Up Users*, N.Y. Times, Nov. 29, 2004, at C6. By the FCC's own account, the cable broadband market is highly concentrated.[3] Moreover, the entire cable broadband market has been dominated primarily by a handful of companies: Comcast, TimeWarner, and Cox Communications. Together these three companies comprise

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[3] In a 2003 Memorandum Opinion and Order, the FCC noted that the Herfindahl-Hirschman Index, a measure of market concentration, for the residential and small business market is between 5500 and 5800. *Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands et al.*, 18 F.C.C.R. 6722, 6775 (memorandum opinion and order) (2003). On previous occasions, the US DOJ has noted that a market with a Herfindahl-Hirschman Index of 1800, a mere fraction of 5500, is considered highly concentrated. *Application of Echostar Communications Corporation et al.*, 17 F.C.C.R. 20559, 20614 (hearing designation order) (2002).

66% of cable broadband sales. *See* Press Release, Leichtmann Research Group, *A Record 2.3 Million Add Broadband in First Quarter of 2004* (May 11, 2004), http://www.leichtmanresearch.com/press/051104release.html. The top six cable broadband pipeline providers control 89% of the market. *Id.*

Feeble competition in the high-speed Internet access market has allowed cable companies to keep prices up. Unlike over the narrowband channel, where prices fell and choice proliferated rapidly, cable companies have maintained uniformly high prices. For example, cross national comparisons of price show that Americans pay between ten and twenty times as much, on a megabit basis, as consumers in Korea and Japan pay. Three years ago, the price gap was half as large. Mark Cooper, *Expanding the Digital Divide & Falling Behind on Broadband: Why a Telecommunications Policy of Neglect is Not Benign* 1 (2004), *available at* http://www.consumersunion.org/pub/ddnewbook.pdf [hereinafter *Expanding the Digital Divide*].

Lack of competition and persistent high prices have exacerbated stratification among households with respect to their ability to access the Internet. For example, while half of households with income above 75,000 dollars have a high-speed Internet connection, half of those with income below 30,000 have no Internet connection at all. *Id.* Internet penetration in households (that is, the number of households who have Internet access at homes) plateaued over the last two to three years. *See* Cooper, *Expanding the Digital Divide* 15.

Those who are priced entirely out of the market do not benefit as much from the educational and civic engagement activities the Internet affords. Mark Cooper,

Inequality in Digital Society: Why the Digital Divide Deserves All the Attention it Gets, 20 Cardozo Arts & Entertainment L.J. 73, 73-74 (2002). Former Secretary of State Colin Powell put it succinctly: "What is at stake is today's digital "have-nots" – especially the young – and whether they may find themselves marginalized for life because they lack the skills and tools to participate in a globalized, knowledge-based economy." Colin Powell, *Is the Digital Divide a Problem or an Opportunity*, Business Week, Special Advertising Section (2000), *available at* http://www.businessweek.com/adsections/digital/powell.htm [4]. People who live on fixed incomes, such as retired individuals who no longer actively earn salaries, are at a special risk of being excluded from these critical educational and civic opportunities. While the Internet's early history encouraged non-discriminatory access for all, its recent history has suggested that commitment to access is receding as prices rise beyond the means of ordinary Americans.

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[4] The FCC has suggested that by giving broadband companies (whether DSL or cable) control on broadband Internet service now will facilitate the rapid deployment of the technology. *See Health of the Telecommunications Sector: A Perspective from the Commissioners of the Federal Communications Commission: Hearings before of the House Subcomm. On Telecommunications and the Internet of the House Comm. on Energy and Commerce Committee*, 108th Cong. 25 (2003). It is not clear why cable companies would slow the deployment of broadband as long as they could still make money selling access to the pipeline, even if they had to abide by open access and non-discrimination guidelines with respect to the parties to whom they sold that access.

3. Lack of ISP competition threatens quality customer service and consumer choice of Internet applications and content.

Second, more competition forces ISPs to serve their customers more effectively. In the narrowband world, there were very few "plain vanilla" ISPs with basic services and no particular distinguishing factor, whether it be outstanding customer service or serving a particular geographical community. Some ISPs focused on providing services specific to small businesses such as setting up networking (allowing computers within a business to connect and share data over a private network) or web-design (helping companies build their own web pages). *See* Shane Greenstein, *Building and Delivering the Virtual World: Commercializing Services for Internet Access* 15, 21 (2000), *available at* http://groups.haas.berkeley.edu/imio/crtp/publications/workingpapers/wp54.PDF. Such ISPs also often offered small businesses their own email address (for example, name@mycompany.com rather than name@cablecompany.com). Others focused on making their technology as easy to use as possible, cultivating customers who were unfamiliar with computers and the Internet. *Id.* Because competitive ISPs tailored their services closely to their core customers, open competition also allowed users to unite through ISPs. ISPs that focused on niche communities with specific hobbies or passions proliferated. Users with particular faiths (World Christian Webhosting), in specific geographical communities (Central Valley Online)(www.rainbowvoice.net) or with individualistic pop culture interests (StarTrek Mail) all found communities online through ISPs marketed specifically to them.
ISPs affiliated with cable companies often provide fewer customer service options and fewer Internet services (such as

browsing, email, making phone calls over the Internet, or video capabilities) than those that have more success in the narrowband market. In fact, cable-affiliated ISPs do not compete in the narrowband channel. Because new users know less about Internet technology than early adopters, they may not even realize that their choices have been intentionally limited.

Even the non-affiliated ISPs a cable company deigns to carry may not be able to provide competitive customer service through a cable company's policies. First, cable companies can use caching to speed access to their own ISP's content (such as websites) as opposed to content provided by unaffiliated ISPs. Jerry Hausman et al., *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 Yale J. Reg. 129, 158 (2001). "Caching" refers to storing data in a location closer to the end user, so that when that information is requested, it is delivered to the consumer more quickly. If a customer knows that by using his cable company's affiliated ISP, he will be able to surf the web more quickly, getting the information he needs, participating in political discussions, or simply buying plane tickets online, he will be more likely to choose the company's affiliated ISP. But, in a world where the cable company does not cache its own content, he might prefer a different ISP which provides him with equal speed but enhanced customer service. The caching policy, then, potentially decreases the overall utility that an individual consumer derives from the Internet.

Second, cable companies can use "policy based routing" to discriminate between different types of content and thereby artificially decrease the desirability of certain ISPs. This technology – which prioritizes which data to send first over the cable wire – serves some important purposes

(for example, prioritizing voice data, which is more time-sensitive, over email data). It also provides ample temptation for abuse. As Lawrence Lessig notes, "the unintended consequenc[e] of these additional features [is] the ability of the network to then sell the feature that it will discriminate in favor of (and hence also against) certain kinds of content." Lawrence Lessig, *The Future of Ideas: The Fate of the Commons in a Connected World* 46-47 (2001). Policy based routing allows network owner's ability to slow down a competitor's offerings while speeding up his own: "like a television set with built-in static for ABC but a clear channel for CBS." *Id.* at 47. Policy based routing can identify network traffic by the type of application, even down to specific brands, by interface used (that is, whether a user is using Internet Explorer to browse the web or Apple Safari), by user type and individual user identification, and by site address (the unique locator for the website a consumer seeks to view). Cisco Systems, *Controlling Your Network: A Must for Cable Operators* 3 (1999), *available at* http://www.cptech.org/ecom/openaccess/cisco1.html.

Third, the pipeline provider can block out rival ISPs content entirely. *See id.* Its affiliated ISP may provide only a fraction of the services of other ISPs. Mark Lemley & Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, 48 UCLA L. Rev. 925, 942-43 (2001) [hereinafter *End of End-to-End*]. For example, it may fail to provide the tutorials, step-by-step instructions, or in-home visits that are so helpful for new users of the Internet. Even if the Internet access provider only slows the transmission of non-affiliated content delivered by the ISP, customers may not attribute this slowness to deliberate choice on the part of the access provider. "If a travel site comes up slowly because it is not a favored site, the user is likely to consider this congestion, not

something owing to the network." Lessig, *Future of Ideas* 160. Thus, while price increases are outwardly evident, limitations on choice decrease the utility consumers receive from the Internet in both obvious and more subtle ways.

4. A competitive market for ISPs spurs innovation and the rapid evolution of technology over the Internet, but as cable pipeline providers have increasingly dominated broadband, the rate of innovation has slowed.

A competitive ISP market promotes rapid technological innovation. First, lower prices open up the Internet to more users. A larger number of users spawns demand for a greater variety of specialized services. For example, without a substantial number of lawyers using the Internet in their workplaces, there would be less reason to develop the Lexis-Nexis and Westlaw services, which both offer substantial amounts of information in a remarkably easy-to-search form. More users spurs the development of these tailored computer programs or services and their dissemination to the community of users as a whole. *Cf.* Consumer Federation of America, *Public Interest in Open Communications Networks* 60 (noting symbiotic relationship between market for personal computers and their applications and market for ISP service and applications).

The open nature of the early Internet created a competitive environment for innovators. If a small inventor with a great idea for better email wanted to go into business, he could make his service available, and users could select the ISP that enabled them to take advantage of this better mousetrap. The narrowband wire, as opposed to the cable wire, did not discriminate between ISPs nor between

different types of email traffic. If the innovation was good, it spread unimpeded. If it was terrible, it was buried through disuse. ISP innovators knew that their inventions would be used if useful because customers had the choice of accessing them, unimpeded by pipeline providers. Historically, smaller ISPs authored preliminary versions of many now-common applications. For example, instant messaging or real-time chat programs (which allow users to type messages back and forth to each other instantly) and web-based email (which allows users to check their email anywhere they have access to the Internet, not just at their own desks) were both developed by independent ISPs.

With the rise of broadband, the rapid rate of innovation has slowed. In the late 1990s, programs that allowed us to check email and look at web pages through web browsers revolutionized the way ordinary people received and sent information, provided new learning opportunities, and allowed people to join together through email lists or websites that united people of a common interest (www.yogasource.com), political background (www.rnc.org), or religious belief (www.livermoretemple.org). People colloquially referred to these new email and browser programs as "killer applications" or "killer apps." With the advent of broadband, the latest killer application might be Voice over Internet Protocol (VoIP) technology. This technology allows people to make phone calls over the Internet. While this technology was developed by small, independent innovators, its deployment and continued improvement is threatened if cable companies support or promote their proprietary VoIP technology while excluding or disfavoring independent providers.

III. THERE ARE CURRENTLY NO ADEQUATE ALTERNATIVE CHANNELS FOR ISP COMPETITION.

Cable companies currently dominate the residential high-speed pipeline market. Other high-speed access channels such as DSL or wireless broadband may never provide sufficient competition for cable. *See* Columbia Telecommunications Corporation, *Technological Analysis of Open Access and Cable Television Systems* (2005 supplement), *available at* < website> [hereinafter *Technological Analysis of Open Access*]. By being an early arriver to broadband access provision, the cable industry has an advantage in locking in consumers. Carl Shapiro & Hal Varian, *Information Rules: A Strategic Guide to the Network Economy* 135-71 (1999) (discussing first-mover advantage and how companies can take advantage of being first in a given field to lock in consumers). For example, consumers incur equipment costs and have to give up their email addresses if they switch providers. And, once customers have signed on to a given provider, their natural tendency to switch is extremely low unless the alternative is either markedly cheaper or markedly better in some way.

Even if customers are ready to switch from cable, there may be no viable alternatives to select. Narrowband access to the Internet is too slow to provide sufficient competition. It simply is no longer a comparable pipeline. Most people switch to broadband for its faster speed. John Horrigan, *Pew Internet Project Data Memo* 4 (2004), http://www.pewInternet.org/pdfs/PIP_Broadband04.DataMemo.pdf. Further, the Justice Department has also recognized that offerings explicitly tailored for broadband often do not work very well over narrowband connections. *United States v. AT&T Corp. & MediaOne Group, Inc.*, Amended

Complaint 8, Case No.: 1: 00CV01176 (RCL) (D.C. Cir. May 26, 2000), *available at* www.usdoj.gov/atr/cases/f4800/4840.pdf. Thus, a narrowband user can do fewer things on the Internet (for example, it may be difficult to participate in an online chat over a narrowband wire) than a broadband user, and the things that a narrowband user can do take much more time for the narrowband user than the broadband user. In short, the narrowband technology is prohibitively inferior.

Digital subscriber line ("DSL") is cable's closest competitor but nevertheless fails to provide a true alternative to cable. About 42% of residential high-speed connections are serviced by DSL lines, but DSL's continued growth is likely limited.

DSL uses special equipment to carry data over telephone lines at higher speeds than conventional modems (which transmit data over the narrowband Internet). Most DSL subscribers do not receive the data speed that cable subscribers receive. Columbia Telecommunications Corporation, *Technological Analysis of Open Access* 7. Thus, DSL is more limited than cable in the high bandwidth services it can provide. *Id.* Most importantly, DSL's fatal weakness is its sensitivity to line conditions: there can be no more than 3.4 miles of copper wire between the phone company's central office and the subscriber, making DSL impractical in most rural areas. Columbia Telecommunications Corporation, *Technological Analysis of Open Access* 9. DSL may never be available in all markets and currently does not reach all the markets that cable reaches. *Id.* at 8-9.

There are no other alternatives available in any significant way. Most high-speed pipeline markets are at

most duopolies, where consumers have a choice of only one or two high-speed pipeline providers (cable vs. DSL). Catherine Yang, *Behind in Broadband: New Policies Are Needed to Help the U.S. Catch Up*, Business Week, Sept. 6, 2004, at 88.

For example, wireless broadband technology has not been widely adopted. Wireless broadband users make up less than 3% of the high-speed Internet services market. *See* Horrigan, *Pew Internet Project Data Memo* 2. Outside of a few metropolitan areas, it may take many years for wireless to provide comparable capacity and coverage to cable. Columbia Telecommunications Corporation, *Technological Analysis of Open Access* 20. Installation challenges, line of sight restrictions, and other technical limitations all continue to hinder the deployment of wireless broadband. *See* Enrico C. Soriano et al., *A Look at Key Issues Currently Shaping Broadband Deployment and Regulation*, 7 Computer & Internet Lawyer 1, 4 (2004). Some of these problems are likely insurmountable. For example, in order for wireless service to work, there must be a relatively open line between the transmitter and the user's computer. This may never be possible in densely populated areas.

In sum, there is no reasonable anticipation of change to the current market. No significant new players have entered the high-speed ISP market in the last few years, either over cable broadband or these other alternatives. Neither DSL nor wireless broadband can provide a forum for significant ISP competition. Intermodal competition – competition between cable broadband and other types of pipeline providers such as DSL – is not enough. By contrast, intramodal competition – ISP competition within the cable broadband medium – would ensure vibrant competition.

IV. THESE CUSTOMER CONCERNS SHOW WHY IT IS SO CRITICALLY IMPORTANT THAT THE FCC PROPERLY CLASSIFY CABLE BROADBAND AS A TELECOMMUNICATIONS SERVICE, AND REGULATE IT IN THE PUBLIC INTEREST, AS CONGRESS INTENDED IT DO.

Classifying cable broadband as a telecommunications service would force the FCC to consider appropriate regulation now. Any appropriate regulation now could prevent much more regulation later, when the dominance of a few cable broadband providers is firmly entrenched. Then, it will be much more difficult to maintain competition among ISPs or resurrect ISPs that have collapsed out of starvation for customers free to select their services. An example of appropriate FCC action is its ruling with regard to the AOL/TimeWarner merger. There, the FCC recognized the potential danger to the public interest from tying ISP services to pipeline access. Following the Federal Trade Commission's lead, the FCC required AOL/TimeWarner to carry three non-affiliated ISPs when it offered its own service and prohibited AOL/TimeWarner from discrimination in its transmission of content for non-affiliated content. *AOL/TimeWarner Merger*, 16 F.C.C.R. 6547, 6593-6596 (2001) (memorandum opinion and order). The FCC instituted these prophylactic measures in order to assure choice later on. The FCC properly saw that stopping anticompetitive behavior (such as carrying only one ISP) early would better protect the interests of consumers in the future.

Characterizing cable modem service as a telecommunications service now gives the FCC the flexibility to achieve an ideal amount of regulation (even if

that ideal amount ends up being no regulation) as the industry develops. *See* 47 U.S.C. § 201-276 (2000). The broadband industry is young, and only a clairvoyant FCC could know how it will evolve over the next three to five years. Requiring the forbearance proceeding forces the FCC to monitor the rapid development of the market, whether that tends toward the further consolidation of the ISP market or a rapid proliferation of new choices. In either case, the forbearance process gives the FCC the tools it needs to obtain the necessary facts and properly manage the industry considering the interests of consumers.

Similarly, merely providing all ISPs "click through" access does not provide sufficient competition. "Click through" access means that ISPs cannot directly sell their services over the cable broadband pipeline, but users may be able to access them once they are online. Click-through access suffers from all of the problems discussed above. Free services, such as Yahoo! mail or hotmail are susceptible to both caching and policy-based routing problems. In addition, customers who choose paid services, for example AOL's ISP must pay for both that service and the cable-affiliated ISP as well. In addition, many providers may only be able to provide a fraction of their services through a click through arrangement. Lemley & Lessig, *End of End-to-End*, 48 UCLA L. Rev. at 942-43.

Misclassifying cable broadband avoids thorough consideration of the state of the industry and the impact of cable broadband's rise on consumers. It fails to accord proper weight to the interests of individual Americans who use the Internet in a growing and astonishing multitude of ways. The interests of these individuals, the way they have been served by the FCC's historical examination of Internet access, and the way that their choice has been limited by the

FCC's failure to examine it now all show how vital it is for the FCC to classify cable broadband correctly.

By according the cable broadband industry with a presumption of regulation that goes with classifying it as a telecommunications service, the FCC would honor both historic legal norms and modern statutory duty requiring it to consider the public interest when regulating channels of communication and commerce. It would preserve choice, innovation, and competitive pricing in one of America's newly dominant media channels. In so doing, it would reverse trends to the contrary. More importantly, it would ensure that the opportunities for life-long learning, information-gathering, and civic participation that the Internet affords flourish in the coming years.

CONCLUSION

For the foregoing reasons, *Amici* urge the Court to affirm the Ninth Circuit's decision below.

February 18, 2005

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, ET AL.,
Petitioners,

—v.—

BRAND X INTERNET SERVICES, ET AL.,
Respondents.

(*Caption continued on inside cover*)

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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FEDERAL COMMUNICATIONS COMMISSION and
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Petitioners,

—v.—

BRAND X INTERNET SERVICES, ET AL.,

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INTEREST OF AMICI[1]

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with over 400,000 members dedicated to the constitutional principles of liberty and equality. The ACLU has been at the forefront in numerous state and federal cases involving freedom of expression on the Internet, including *Reno v. ACLU,* 521 U.S. 844 (1997), and *Ashcroft v. ACLU,* ___ U.S. ___, 124 S.Ct. 2783 (2004).The ACLU believes that cable Internet access should be subject to common carriage requirements, affording open access. The ACLU is interested in ensuring non-discriminatory access to preserve and promote the Internet as an open, content neutral forum for free expression.

The Brennan Center for Justice at NYU School of Law, founded in 1995, unites thinkers and advocates in pursuit of a vision of inclusive and effective democracy. The Center's Free Expression Policy Project engages in research, advocacy, and litigation in the fields of media democracy, intellectual property, and other issues affecting the diversity and breadth of expression available to Americans. Like the ACLU, the Brennan Center believes that it is vitally important to ensure non-discriminatory access to the Internet as a forum for free expression.

STATEMENT OF THE CASE

This case is about the legal impropriety of the Federal Communications Commission's (FCC) classification of cable broadband as an information service. In 1996, Congress updated United States communication law with the passage of the Telecommunications Act. Pub. L. 104-104, 110 Stat.56. "[T]he statute maintained significant common carrier obligations on

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[1] Consent has been lodged with the Court pursuant to Sup. Ct. R. 37(3)(a). No counsel for a party in this case authored this brief in whole or in part, and no person or entity other than the *amici* or their counsel made a monetary contribution to the preparation and submission of this brief. Sup. Ct. R. 37(6).

providers of 'telecommunications services' but left providers of 'information services' subject to much less stringent regulation." *Brand X Internet Servs. v. FCC*, 345 F.3d 1120 (9th Cir. 2003). Under this statutory framework, the manner in which a communications service is characterized becomes extremely important because the regulatory consequences vary significantly depending on that classification.

Following the Act, a number of federal courts were asked to address the question of how cable service should be classified, frequently in the context of determining whether a local franchising authority could condition a cable franchise on non-discriminatory access to the cable pipeline. For example, in *AT&T Corp. v. City of Portland*, 216 F.3d 871, 880 (9th Cir. 2000), the Ninth Circuit ruled that "the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act," and thus could not be regulated as a cable service by a local franchising authority. In *MediaOne Group, Inc. v. County of Henrico, Virginia*, 257 F.3d 356, 365 (4th Cir. 2001), the Fourth Circuit agreed that the Communications Act pre-empted local regulation of cable broadcast services without ultimately deciding whether cable broadband is properly characterized as a telecommunications service or an information service.

In the midst of this judicial activity, the FCC issued a notice of inquiry in September 2000, announcing its intention to determine whether and how to regulate cable broadband service. Federal Communications Commission, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 15 F.C.C.R. 19287 (2000).

On March 15, 2002, the FCC issued a Declaratory Ruling and a notice of proposed rulemaking in which it concluded that cable modem service is properly classified as an information service and that there is no separate offering of telecommunications service. Federal Communications Commision, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 F.C.C.R. 4798, 4802 (2002). If upheld, this decision means that cable broadband providers would only be subject to regulation, if at all, under the

less stringent provisions applicable to information services and not under the more comprehensive regulatory scheme that applies to common carriers. In effect, the Commission leaves itself without authority to impose any meaningful regulation to protect the public interest.

Multiple petitions for review of the Commission's ruling were filed in the Third, Ninth, and District of Columbia Circuits. On April 1, 2002, the Judicial Panel on Multi-district Litigation transferred the related petitions for review to the Ninth Circuit for consolidation.

The Ninth Circuit decided that its precedent in *City of Portland* controlled, overruled the FCC's categorization, and remanded to the FCC for regulatory proceedings consistent with the court's prior holding that, "to the extent [a cable operator] provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act." *Brand X*, 345 F.3d at 1129, quoting *City of Portland*, 216 F.3d at 878. This Court then granted *certiorari*.

SUMMARY OF ARGUMENT

The FCC's classification of cable broadband as purely an "information service" violated its legal mandate. The Telecommunications Act's definition of "telecommunications service" unambiguously includes a service that enables customers to send information of their choice to the recipients of their choice. Whether Internet users choose to send e-mails, to upload video or audio files, or even to use the Internet as a telephone or videoconferencing infrastructure, the cable broadband service they rely on is a telecommunications service, indistinguishable except in technology from regular telephone service.

Moreover, the FCC violated the law by failing to satisfy its statutory duty to consider the public interest, particularly citizens' free speech and privacy interests, as Congress specifically mandated that it do. The 1996 Telecommunications

Act requires the FCC to act in the public interest and this Court has repeatedly recognized the importance of First Amendment principles in regulating communications services. While private actions by cable broadband providers do not directly implicate the First Amendment, the statute does require the FCC to consider the effects its regulations will have on free speech. The FCC improperly avoided making this inquiry, as Congress intended, by failing to recognize that cable broadband service includes a telecommunications service component.

Virtually all regions of the United States have only one cable company as the sole provider of the physical wires that form the basis of cable broadband services. Without regulations treating cable modem service as a common carrier telecommunications service, cable companies can leverage ownership of the physical infrastructure into control of citizens' access to and use of the Internet.

This threatens free speech and privacy. A cable company that has complete control over its customers' access to the Internet could censor their ability to speak, block their access to disfavored information services, monitor their online activity, and subtly manipulate the information sources they rely on. Customers may have no choice but to submit to this surveillance. While dial-up access to the Internet was once a viable alternative, the superior data transmission rates of cable broadband will increasingly dominate the market. Other theoretical alternatives either have serious practical drawbacks or are years away from availability. When telephone service became significant, the decision to regulate the service as a common carrier protected the free speech and privacy rights of the people. As the Internet becomes even more important as a voice of the people and a vital free forum for information, preserving free speech and privacy requires content-neutral common-carrier regulation for the cable broadband companies who are the vital pipeline between consumers and the Internet. The FCC's failure to consider the public interest in free speech and privacy, as intended by Congress, renders its regulations arbitrary and capricious.

ARGUMENT

I. THE FCC IS OBLIGATED TO PROMOTE FREE SPEECH AND PRIVACY WHEN CLASSIFYING AND REGULATING CABLE INTERNET SERVICE

In the 1996 Telecommunications Act, Congress specifically charged the FCC with acting in the public interest when regulating cable broadband. The Act requires the FCC "to promote the policies and purposes of this chapter favoring ... vigorous economic competition, technological advancement, and promotion of the public interest, convenience, and necessity." 47 U.S.C. § 257(b) (2000).

This Court has recognized that the FCC's conception of the public interest "invites reference to First Amendment principles." *Columbia Broadcasting System, Inc. v. Democratic National Comm.*, 412 U.S. 94, 122 (1973). One of those core principles is that the public interest is better served by more speech than by less. Thus the First Amendment "rests on the assumption that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public...." *Associated Press v. United States*, 326 U.S. 1, 20 (1945). An unbroken line of precedents has reinforced the importance of a national communications policy that enhances, rather than restricts, the diversity of information sources. *Columbia Broadcasting System, Inc. v. FCC*, 453 U.S. 367, 395-96 (1981); *Federal Communications Commission v. National Citizens' Comm. For Broadcasting*, 436 U.S. 775, 794-97 (1978); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969); *National Broadcasting Co. v. United States*, 319 U.S. 190, 216-17 (1943). *Cf Federal Communications Commission v. League of Women Voters*, 468 U.S. 364, 377-81 (1984) (reaffirming FCC's

power to regulate in order to expand diversity and availability of expression, but not to suppress it).

That principle, of course, was first developed in a traditional communications universe, where the public interest could be adequately served by ensuring that listeners received a variety of viewpoints. Those public free speech interests are greatly magnified on the Internet, where listeners or viewers are also speakers and creators who themselves communicate over the Internet pipeline. *See ACLU v. Reno*, 929 F.Supp 824, 843-44 (E.D. Pa. 1996), *aff'd*, 521 U.S. 844 (1997) ("Because of the different forms of Internet communication, a user of the Internet may speak or listen interchangeably, blurring the distinction between "speakers" and "listeners" on the Internet....").

Below, we illustrate how broadband providers with significant market power can control how citizens communicate over the Internet, often without their knowledge. Integrated control of both the pipeline and the communications that flow over it converts the cable company into a gatekeeper to the Internet, with the power to control and monitor its subscribers. When the FCC gave cable modem service providers the ability to prevent users from choosing what Internet service provider (ISP) they use, and thereby what information they can disseminate or to receive over the Internet, the FCC ignored the fundamental public interest in promoting more speech.

In crafting the 1996 Telecommunications Act, Congress recognized that regulation of telecommunications services as common carriers was presumptively in the public interest, but might not always be so. It therefore stipulated that the FCC might decline to exercise its regulatory authority over telecommunications services if its determined, after an appropriate hearing, that regulation is unnecessary to prevent discrimination and protect consumers and forbearance is "consistent with the public interest." 47 U.S.C. § 160(a).

The FCC did not follow that statutorily required path. No forbearance proceeding occurred because the FCC refused to acknowledge that the telecommunications component of broadband service must be regulated as a telecommunications

service. *Amici* agree that the FCC has no role in regulating the constitutionally protected content delivered by ISPs. Indeed, any attempt to do so would almost certainly violate the First Amendment. But that constitutional truism does not justify the FCC's unwillingness to acknowledge that cable broadband service performs a dual function. As explained more fully in the following sections, it provides both the pipeline and the information that travels over that pipeline. These separate functions require a separate legal and factual analysis. Instead, the FCC treated them as one. Beginning with a faulty premise, the FCC unsurprisingly reached an unsupportable conclusion.

An administrative agency is owed no judicial deference if its decision is reached in an arbitrary and capricious manner, or, "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D) (2000). "Normally, an agency rule would be arbitrary and capricious if the agency relied on factors which Congress has not intended it to consider, [or] entirely failed to consider an important aspect of the problem...." *Motor Vehicle Manufacturers Assn. of U.S., Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 43 (1983). The FCC mischaracterized the nature of cable broadband service and failed to conduct a regulatory forbearance proceeding required by law. As a result, it did not give the necessary consideration to the critical matter of the public's free speech and privacy interests, in the manner that Congress intended. This Court should not allow the FCC to conceal its procedural failings with an act of definitional legerdemain.

Had the FCC correctly defined cable broadband to include a telecommunications service as well as an information service, and then properly considered the public's interest in free speech facilitated by a broad array of choices for broadband Internet service, we believe the evidence would have compelled the FCC to find that non-discrimination is in the public interest. 47 U.S.C. §§ 201-202.

II. THE FCC RULING ALLOWS CABLE PROVIDERS TO LEVERAGE MARKET DOMINANCE OVER THE PROVISION OF AN INTERNET PIPELINE INTO CONTROL OF THE MARKET FOR INTERNET SERVICES

Providers of cable lines possess tremendous market power over the provision of high-bandwidth pipelines to households, thanks to a nearly complete monopoly over cable lines to the home. Until 1992, the law permitted localities to award exclusive cable franchises, and many did. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No 102-385 §7, 106 Stat. 1460, 1483 (banning exclusive franchises). Today's large cable companies owe their dominance in the market to the earlier government-granted monopoly. The first cable company to lay cable lines in an area is unlikely to encounter a subsequent competitor for the provision of cable lines. It is expensive to build a network of cable access lines, and there is little economic incentive to build a second network in parallel with a preexisting pipeline. An "overbuilder" seeking to compete for the same pool of subscribers must duplicate the efforts of the incumbent, building redundant lines and arranging for redundant connections to households. The extra cable lines must either be strung from pole to pole or buried underground, an expensive process that costs several hundred dollars per home served. *See* Dorothy Pomerantz, *If You Overbuild It*, Forbes (Apr. 16, 2001), *available at* http://www.forbes.com/forbes/2001/0416/144.html (last visited Feb. 15, 2005). The reward for this substantial investment is entry into a market where the overbuilder does not enjoy monopoly control. Instead, it must compete with an already entrenched provider that could use its pre-established market power to drive the overbuilder out. *See* Federal Communications Commission, *Eighth Annual Report on Competition in Video Markets* 83 (2002), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-01-389A1.pdf (last visited Feb. 15, 2005) ("Commenters report that...particularly where a new entrant may appear vulnerable for financial or other reasons, the initial response of a large incumbent...may be motivated by anticompetitive animus rather than legitimate business concerns."); *Id.* at 81-82 (describing allegedly predatory rate cuts by incumbent).

Compared to the prospect of being the only provider of cable lines, the economic incentive to build a competitive system is extremely weak.

The expected result – that cable providers will not build out to compete with each other – is borne out in the data. In 2004, the FCC noted that only 305 of the nation's 33,760 cable community units – less than one percent – had been found to enjoy "effective competition" among wireline providers. Federal Communications Commission, *Eleventh Annual Report on Competition in Video Markets* 74 (2005), *available at* http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-05-13A1.pdf (last visited Feb. 13, 2005).[2] For the vast majority of Americans, there is no freedom to choose which cable line to use. Their choice is to either hook up to the sole provider or disconnect from cable modem service entirely.

Originally, market control over the provision of cable lines only gave companies practical control over the delivery of cable TV. Today, though, advancing technology has radically changed the nature of the services provided over this pipeline. *See* Columbia Telecommunications Corp., *Technological Analysis of Open Access and Cable Television Systems* 11 (2001), *available at* http://www.aclu.org/Privacy/Privacy.cfm?ID=13627&c=252 [hereinafter *CTC Analysis*]. Users can now access the Internet over cable lines, allowing them to send as well as receive information at extremely fast speeds. *Id.* at 12. Controlling the cable pipeline means that, in the absence of regulation, cable companies also can control the provision of services that allow citizens to access the Internet.

But just as cable television access and network television are different services, the provision of broadband access to the Internet (thepipeline) and the provision of Internet services are two separate services. *See* Columbia Telecommunications Corp., *Technological Analysis of Open Access and Cable Television Systems* 2 (2005 supplement), *available at* http://www.aclu.org

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[2] The FCC found effective competition in a total of 1,241 units, but in 936 of those, the competition came from satellite providers that had attained a 15% market share. *Id* at 74 n. 627.

/Privacy/Privacy.cfm?ID=17507 [hereinafter *CTC Supplement*]. The conceptual difference between pipeline provision and information service provision is simple but significant. As pipeline providers, cable companies maintain their cable installations and provide a conduit – a 'pipe' that carries data to and from customers. Exactly *what* data are carried is immaterial to the physical pipeline; they could be video images, voice communication, text, or any combination of all of the above. *See id.* The information could be headed to any destination or coming from any source on the Internet. Those details are handled by Internet routers, machines along the way that decide which road the data should travel next. *See* Cisco Systems, *Routing Basics*, *available at* http://www.cisco.com/univercd/cc/td/doc/cisintwk/ito_doc/routing.htm (last visited Feb. 15, 2005). Regardless of how or what information is ultimately communicated to the human users at the ends of the cable network pipe, inside the pipe it all takes the same form: a digital stream of ones and zeroes. The pipe's job is merely to carry those bits quickly and reliably from one end to the other.

The cable pipeline is therefore a neutral transport mechanism for whatever information the users ask it to send; it *carries* data rather than *providing* it. Congress has supplied a name for this sort of operation, which "transmit[s], between or among points specified by the user...information of the user's choosing, without change in the form or content of the information as sent and received"; it is called a "telecommunications service." 47 U.S.C. §§ 153(43), 153(46).

ISPs, on the other hand, structure and frame the ways in which people experience and use the Internet. ISPs can control the information users are able to send and receive. An ISP can choose to provide email, webhosting, video or other services. *See, e.g.*, Road Runner, *High Speed Online – Features*, *at* http://content.rr.com/rdrun/feat.htm (last visited Feb. 15, 2005). It can filter out material it deems inappropriate for children. *See, e.g.*, America Online, *About Parental Controls*, *at* http://www.aol.com/info/parentcontrol.html (last visited Feb. 15, 2005). It can provide users with a start page that brings certain information to one's attention. *See, e.g.*, *Welcome to EarthLink*, *at*

http://start.earthlink.net/ (last visited Feb. 15, 2005). It can, if it wishes, slow or block access to disfavored information for any reason. Metaphorically, the cable wire or pipeline is like a highway, and the Internet service is like a company that owns the trucks that drive on the highway. Cable companies may own the road, but that doesn't mean they also must own the trucks. Yet, this is the conflation made by the FCC in ruling that cable modem service is an information service alone, and not also a telecommunications service.

As a result of this conflation, the owners of the pipeline will be permitted to control access to the Internet road. Not only will they be allowed to charge whatever toll they want, they will be able to discriminate against other ISPs, effectively refusing to allow FedEx trucks on a UPS-only road. Consumers who wish to connect to the Internet via cable broadband are forced to choose from whatever ISPs the local cable provider chooses to make available, even if there is only one.

Limited choice is not a necessary part of the design. Different ISPs could reach their customers over separate frequencies on the same pipeline, just as analog cable channels occupy separate parts of the band on the cable. *See CTC Analysis* 23-25. Consumers could change their Internet service provider literally by changing the channel, without any need to make changes in their physical cable connection. Alternatively, different ISPs could share the same frequency range, and a router at the cable company's facility could dispatch traffic to each customer's ISP of choice. *Id.* at 25-32. Under this scheme, the number of ISPs sharing the pipe is limited only by the capacity of the router, not by any intrinsic constraint on the pipe itself. *Id.* at 26. The ability to add additional ISPs virtually at will differs greatly from the technical constraints on "must-carry" provisions for cable TV, where each channel added to the lineup means one that must be eliminated. *See Turner Broadcasting System v. FCC*, 512 U.S. 622, 674 (1994) (O'Connor, J., dissenting). Either a multichannel or shared pipe approach would enable multiple information service providers to share the same cable line, facilitating competition.

The FCC itself acknowledged both the wisdom and feasibility of mandated non-discriminatory access when it approved the merger of Time Warner and America Online. Federal Communications Commission, *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee* 22-23 16 F.C.C.R. 6547 (2001) [hereinafter *Time Warner Application*]. But today, in the absence of regulation, cable broadband companies are engineering their pipelines to prevent access by competing ISPs in the future. These operators are implementing a standard for cable modem communication, DOCSIS, that forecloses the capability to connect Internet users to multiple ISPs. *CTC Supplement* at 57-58.

The forced bundling of the means of transmission (pipeline) with Internet services (email, web browsing, etc.) is unprecedented in the history of the Internet. The dial-up services that citizens commonly used to access the Internet in its early days allowed people to select whichever ISP they wanted on equal, nondiscriminatory terms. Users could change the ISP they connect to merely by changing the phone number they dialed. Because the FCC and state governments regulated telephone providers as common carriers, the phone companies could not leverage their control over dialup lines into one over Internet service or ISPs. *See* Lawrence Lessig, *The Future of Ideas* 148 (2001)("Phone companies...did not play these games, because they were not allowed to."). As a result, thousands of ISPs, empowered to connect to their subscribers over regulated phone lines, sprang up to fulfill the public demand for various flavors of Internet access. *See* Shane Greenstein, *Building and Delivering the Virtual World: Commercializing Services for Internet Access*, 68 J. Indus. Econ. 391, 392 (2000), *available* at http://www.kellogg.northwestern.edu/faculty/greenstein/images/articles.html (last visited Feb. 15, 2005).

If cable companies need not make their lines available to competing ISPs, they need fear no equals – or superiors – in the new market for cable broadband Internet. In the AOL/Time Warner merger, the FCC found that the new merged entity's

dominant market power "would frustrate statutory goals and Commission policies designed to ensure that the American public has access to a diversity of information sources...." *Time Warner Application* at 22. Imposing a requirement of non-discriminatory access would ensure that "[m]arket forces, not control of a bottleneck facility, would determine the firms that would succeed in the relevant market, thereby enhancing efficiency and consumer welfare." *Id.* at 42. Consistent with these determinations, the FCC imposed a number of open-access requirements on Time Warner's cable Internet service. *Id.* at 54-57.

Most importantly, when customers have a choice of ISPs, they have a choice of what and how to communicate over the Internet. If an ISP discourages or stifles their communications, the citizen can simply change ISPs. If the ISP tracks how the citizen uses the Internet for the purpose of marketing or targeted advertising, for example recording what webpages she visits or books she purchases online, then the customer can simply change ISPs.

III. CABLE BROADBAND IS THE ONLY INTERNET SERVICE OPTION FOR MANY CITIZENS

For many consumers, cable broadband is the only feasible choice for accessing the Internet.

Dialup access, also called narrowband, is no longer a realistic option for an increasing number of Internet users. Phone lines supplied the first generation of consumer Internet access. Users connected to the Internet by placing telephone calls to computers at an ISP. In order to send digital information over the phone line, they used modems (modulator-demodulators) that translate data into hissing and beeping noises that can be sent over telephone lines designed to carry only sound. The resulting connections were capable of transmitting a few tens of thousands of bits – binary digits, either zero or one – per second. *See* Microsoft Corp., *Windows XP Professional Product*

Documentation: Modem Overview, *available at* http://www.microsoft.com/resources/documentation/windows/xp/all/proddocs/en-us/sag_modeconcepts_001.mspx (last visited Feb. 15, 2005).

By comparison, cable modems are capable of speeds dozens or even hundreds of times faster – millions of bits per second. *See Road Runner High Speed Online*, *at* http://www.timewarnercable.com/corporate/products/highspeedinternet/ (last visited Feb. 15, 2005) (advertising speeds "70 times faster than dial-up"); Cox Communications, *Fairfax Rates*, *at* http://www.cox.com/Fairfax/Rates.asp (last visited Feb. 15, 2005) (135 times faster). Many Internet applications can still be used over slow dialup links – electronic mail, instant messaging, browsing basic Web pages – but many modern Internet innovations require the ability to send and receive data at much faster rates than are possible with dialup. *See, e.g.*, Apple Computer, *iChat AV*, *at* http://www.apple.com/ichat/ (last visited Feb. 15, 2005) ("personal videoconference over any broadband connection"); Microsoft Corp., *About Xbox Live*, *at* http://www.xbox.com/en-US/Live/about/default.htm (last visited Feb. 15, 2005) (online gaming arena requires "[h]igh-speed Internet service"). While some applications still function over narrowband, they work much faster over broadband. As applications like Internet telephony, videoconferencing, audio streaming, and graphics-intensive web pages grow more prevalent and compelling, dialup is simply an unacceptable alternative to broadband access.

Other broadband alternatives exist, but are generally technically inferior to cable or are not available to many consumers. The second choice in broadband today is digital subscriber line (DSL), which uses special equipment to carry data over telephone lines at higher speeds than conventional modems. DSL's weakness is its sensitivity to line conditions; there can be no more than about 18,000 feet of copper wire between the phone company's central office and the subscriber, and aging wire or other impediments along the way can reduce the effective distance or even make the line completely unusable for DSL. *CTC Supplement* at 8-9. Especially for geographically widespread users

like those in rural areas, DSL availability is therefore an iffy proposition. Where it is available, it generally provides slower speeds – "a competing network…of roads, not superhighways." *Id.* at 2.

To the extent that DSL is available as a competitor service to cable, there nonetheless tends to be a duopoly in which each provider retains significant market power. The FCC has found that, "typical broadband internet market is very highly concentrated." In 2002, 65% of residential and small business broadband connections were cable and 31% were DSL. Only three percent of these connections used any other technology. Federal Communications Commission, *In the Matter of Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access*, 18 FCC Rcd 6722, 6775 (2003).[3]

More exotic broadband possibilities include powerline service, where signals are carried over electrical transmission lines, satellite Internet, long-range wireless, and fiber optics strung directly to the home. Powerline broadband is still in the early development and trial phase, and there is some concern that it may cause radio signal interference. *See* Barry C. West, Federal Emergency Management Agency, *Comments of the Federal Emergency Management Agency on Broadband over Power Lines Implementation*, *available at* http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6515582317 (last visited Feb. 10, 2005); *CTC Supplement* at 13-19 (noting technical concerns and describing the small number of trials underway). Satellite is significantly more expensive, both per month and in the up-front costs of purchasing, installing, and pointing a dish. *CTC Supplement* at 47-48. Due to the long distance the signal must travel to a satellite in geosynchronous orbit, the service suffers from signal delay that renders many real-time applications unusable or at best extremely annoying to users. *Id.* at 43-44. Terrestrial wireless service as a primary means of

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[3] *Amici's* argument that a regulatory scheme that promotes single ISP market dominance threatens speech and privacy extends to DSL broadband providers who exercise such market power as well. Because the case at hand deals with the classification of cable broadband, we focus on that here.

Internet access is still in development and will necessarily run up against the limited capacity of the over-the-air wireless spectrum. *Id.* at 2-3. Optical fiber run straight into the home has tremendous promise; "theoretically [it has] almost unlimited capacity." *Id.* at 33. At present, it costs thousands of dollars per fiber drop, and has only been deployed to a few thousand homes. *Id.* The future of fiber as a technology is bright, but its future as a marketed service is murky and unclear. *Id.* at 3.

Given the limited availability and performance of alternatives, people are frequently locked into cable as their only viable choice for Internet access. The fact that Internet users have only one good choice, cable, for the type of access they buy, coupled with the fact that cable companies can force their customers to use the selected or affiliated ISP means that unregulated cable companies will be powerful gatekeepers to the Internet.

IV. CABLE COMPANIES, AS INTERNET GATEKEEPERS, CAN CONTROL THE FLOW OF INFORMATION AND THREATEN FREE SPEECH AND PRIVACY ONLINE

An Internet service provider can control its customers' use of the Internet to communicate or to track what users do and say online. Where citizens have a choice of ISPs, users who like filtering or other content restrictions can flock to an ISP that content discriminates, while those who do not like it have other choices. But when a single provider can force customers to choose a particular ISP, the ISP can burden free speech and privacy without fear of losing customers. Metaphorically, if the cable pipeline is a road, and the ISPs are the companies that own the trucks that drive on the road, then Internet communications are the packages that users send in the trucks. If there's only one trucking company to choose from, and those trucks refuse to carry a particular package of communications, then those senders, Internet speakers, have no speech alternatives. They cannot protect their interests by switching providers.

This Court recognized the fundamental importance of public access to a variety of communications unfettered by the owner of a particular communications pathway in *Turner Broadcasting*. As this Court observed about cable television: "simply by virtue of its ownership of the essential pathway for cable speech, a cable operator can prevent its subscribers from obtaining access to programming it chooses to exclude. A cable operator, unlike speakers in other media, can thus silence the voice of competing speakers with a mere flick of the switch." 512 U.S. at 656. Impelled by the danger of private censorship, and noting that, "[t]he First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas," *id.* at 657, this Court deemed "must-carry" regulations requiring cable operators to carry local broadcast channels to be content-neutral. *Id.* at 661-62. The present questions about cable Internet access share many of the same contours as those resolved by the Court in *Turner Broadcasting*.[4]

The Internet is a tremendous wellspring of democratic speech, a facility that, "provides an opportunity for those with access to it to communicate with a worldwide audience at little cost." *American Library Ass'n, Inc. v. United States*, 201 F. Supp. 2d 401, 416 (E.D. Pa. 2002) *rev. on other gr.* 539 US 198 (2003). It is irreplaceable as a facilitator of free expression; no other medium gives speakers the same power to reach so much of the world so cheaply and easily. No alternative channel of communication accessible to ordinary citizens comes close. As

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[4] While monopoly control over content is a similar concern in both cable television and cable broadband Internet, the two services are distinct as a matter of statutory definition. Cable television is a "cable service," sending a "one-way transmission to subscribers of video programmming or other programming service" and receiving only that "subscriber interaction...required for the selection or use of such video programming...." 47 U.S.C. § 522 (2000). Cable broadband, as argued above, is a two-way "telecommunications service." Mandated common carrier access for broadband would affect only those parts of the cable line that provide telecommunications. It would not change the regulatory framework for cable TV.

more users go online and more discourse shifts to the network, potential restrictions on online speech pose an ever greater threat of injury to that discourse. The need to protect Internet users from systemic regulations that threaten to chill or hinder their speech grows with every increase in network usage.

Cable ISPs can enjoy far more fine-grained power to both control and observe users' communications to a far greater extent than cable television providers could. They have this power as a result of sitting on a choke point on the network; since the ISP provides access and passes information from its users to the Internet at large, every message users send and receive must pass through it. *See CTC Analysis* at 18-19. Those messages are processed on an individualized basis by the ISP's computers, not broadcast to many or all subscribers like the video images carried over cable television. The ISP can program its computers to do whatever it wishes with messages to or from subscribers. Generally, the programming directs that the messages be routed to their destinations without delay. There is, however, no technical requirement that all messages be treated in this way; what can be done with the users' messages is limited only by what a computer can be programmed to do. Since a computer can be programmed to do nearly anything with information, there are virtually no limits to ISPs' power in this arena. They can set up their systems to block messages, prioritize some over others, or record them for later inspection. *Id.* at 19-20.

For example, cable ISPs might seek to inspect the content of users' communications in ways that violate privacy. An ISP might keep records of what Web pages its customers have visited. At least one cable ISP, Comcast, has already done so. Stefanie Olsen and Rachel Konrad, *Comcast Privacy Move its Latest Woe*, CNET News.com (2002), *at* http://news.com.com/2100-1023-836937.html. The company could then sell this tracking information to marketers who wish to target advertising to consumers with particular interests, bringing more unwanted commercial email ("spam") into users' inboxes and increasing the risk that their personal information might leak to identity thieves. Customers who did not wish to disclose their surfing habits would have no other practical option.

Even more invasive measures are possible; ISPs might scan through their customers' electronic mail messages for information about their online purchases. One electronic mail provider has been caught doing just that, as part of a scheme to benefit its affiliated bookselling business by tracking customers' communications with Amazon.com. *See United States v. Councilman*, 373 F.3d 197 (1st Cir. 2004), *vacated by* 385 F.3d 793 (1st Cir. 2004). The extent to which ISPs can pry into their customers' online communications is nearly unlimited.

To control the way citizens use the Internet to communicate, cable ISPs can configure their services to delete or slow selected information based on source, destination, or even subject matter or viewpoint, as the ISP desires. *CTC Supplement* at 49-50. Technology to enable this sort of discrimination is actively marketed to ISPs. Cisco, the leading manufacturer of Internet routing equipment, advertises that its products can be used "to prevent outside content providers from disrupting the cable network by delivering broadband content without authorization." Cisco Systems, *Controlling Your Network – A Must for Cable Operators* (1999), *available at* http://www.cptech.org/ecom/openaccess/cisco1.html (last visited Feb. 7, 2005).

Cable companies also can profit from setting up their networks to favor information from affiliated content providers. They can reserve capacity on their telecommunications lines as a "fast lane" for data from preferred sources, and offer preferential treatment only to those who have paid for the privilege or who are part of the same umbrella corporation. *CTC Analysis* at 20. For instance, Time Warner could choose to speed access to CNN's website and slow access to other news sources. An ISP could take payment from a music distribution service like Napster to ensure that its downloads go faster than those of songs provided by Apple's iTunes. To subscribers, the discrimination would be perceived only as data arriving faster or slower. They would not be able to distinguish it from normal variances in network congestion: "[a] cable Internet customer has no way of knowing if and how traffic flow management is being used and what policies cable system administrators are setting." *CTC Supplement at 53.* Yet, the discrimination would be there nonetheless, steering

subscribers to certain areas of the Internet, and away from others without their knowledge. In an era of increasing media consolidation, content discrimination can be good business.

Additionally, cable providers may use their market power to stop their customers from making certain uses of the Internet. For instance, an ISP that also operated a traditional telephone or mobile phone service could block its customers' access to companies like Vonage, which sell economical Internet-based telephone applications. *Id.* at 49. The ISP could not only block Internet telephony applications, but also Vonage's marketing messages or webpage from traveling over its pipeline. Customers may literally never know what they are missing. This is not mere speculation. Vonage already alleges that some DSL providers – ones owned by incumbent phone companies with which it competes – are discriminating against it. *See* Paul Kapustka, *Vonage Complaining of VoIP 'Blocking,'* Advanced IP Pipeline (Feb. 14, 2005), *available at* http://advancedippipeline.com /60400413 (last visited Feb. 15, 2005). Along the same lines, ISPs might choose to block customers from viewing streaming video online in order to steer them to watch the cable company's television offerings instead.

Cable companies might also selectively block applications as part of a price-discrimination scheme. For instance, business users could be forced to pay more for the right to use virtual private network (VPN) software to securely access their office network, or users who wished to operate their own Web server might be charged a premium. *CTC Analysis* at 19-20. Customers unwilling to pay the additional price might find themselves unable to protect their privacy using a VPN or speak using their own Web outlet. Those willing to pay would be charged monopoly rates. *See* Bob Brewin, *Telecommuters Must Pay Extra for Cable VPNs*, Computerworld (Dec. 13, 2001), *available at* http://www.computerworld.com/managementtopics/outsourcing/isptelecom/story/0,10801,66589,00.html (last visited Feb. 14, 2005).

There is no practical limit to the way that broadband providers with market dominance can impact speech on the Internet. A dominant cable ISP could discriminate against certain communications simply because they present an alternative

political viewpoint or criticizes the cable company's business practices. An ISP controlled by a politically-inclined CEO or board could use the network to promote political positions supporting its candidates or issues. It could block or slow access to the websites of rival candidates, or redirect users to the preferred candidate's site. It could delete emails from rival political parties before they reach customer mailboxes. It could block or slow access to news articles critical of the company.

When a newspaper engages in this sort of political discrimination, it is protected editorializing, and citizens have the ability to seek out alternative viewpoints. But when customers do not have a meaningful choice of Internet access provider, the ISP can, for entirely understandable business reasons, pose a real and acute threat to free speech interests. Without real ISP choice, customers have no economic leverage or choice in favor of speech. If a private entity can undermine the exercise of free expression, the Internet may cease to be a place where, as this Court recognized in *Reno v. ACLU*, any user can, "become a town crier with a voice that resonates farther than it could from any soapbox." 521 U.S. 844, 870 (1997). In *Reno*, the Court protected the Internet from state censorship by holding that the First Amendment applied to this novel and unprecedented engine for free speech. Here, the threat to speech comes from this FCC decision to entitle private entities to wield their market power to restrain customer choice and speech, if they so wish.

Congress has acted upon this concern; it recognized the promise of communications lines for facilitating free speech, as well as the threat of monopoly control, when it enacted the Telecommunications Act. Regulating the broadband pipeline as a telecommunications service would mitigate these dangers by enabling Internet users to have a choice of ISPs. Citizens then have the option of selecting ISP services that accord with the way they want to communicate on the Internet. That recognition was part of the reason for the FCC's statutory mandate to consider the public interest carefully before forbearing from telecommunications service regulations.

The Internet became the engine for speech this Court recognized in *Reno v. ACLU* thanks to the FCC policy that

prevented network owners from discrimination, giving rise to the wide availability of many competing ISPs, all of which exercise their own free speech rights in concert with their customers'. In an open-access non-discriminatory environment, each ISP – including the one owned by the cable company or other telecommunications provider – retains the ability to select what content it will send over the telecommunications lines. Consumers also retain the power of choice, and those that wish to speak and listen without restriction can choose an ISP that will make their speech activities possible. The public interest in this kind of competition-fueled free speech market is as strong if not stronger over broadband Internet as it was over narrowband. To protect this fundamental public interest, the FCC must first facilitate ISP competition over the cable lines by properly classifying broadband pipes as telecommunications services.

CONCLUSION

For the reasons stated, the judgment below should be affirmed.

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No. 04-277 & 04-281

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

-and-

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS AS AMICUS CURIAE SUPPORTING RESPONDENTS AND AFFIRMANCE OF THE DECISION BELOW

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The Regulatory Status of Broadband Services: Information Services, Common Carriage, or Something In Between?: Hearing Before the House Comm. On Energy and Commerce, Subcommittee on Telecommunications and the Internet, 108th Cong. 16-17 (2003) (Statement of Robert B. Nelson, Chairman, National Association of Regulatory Utility Commissioners) 8, 8n. 10

INTEREST OF AMICUS CURIAE[1]

The National Association of Regulatory Utility Commissioners ("NARUC") is a quasi-governmental nonprofit organization founded in 1889. NARUC represents the government officials in the fifty States, the District of Columbia, Puerto Rico, and the Virgin Islands, charged with the duty of regulating, *inter alia*, telecommunications common carriers. These State officials retain the obligation to assure that such telecommunications services and facilities as may be required by the public convenience and necessity are provided at just and reasonable rates. NARUC's responsibilities are nationwide and involve a unique and broad spectrum of responsibilities. The U.S. Congress and federal courts have recognized NARUC as a proper representative of the collective interests of State utility commissions. NARUC is "the national organization of the State commissions" responsible for economic and safety regulation of the intrastate operation of carriers and utilities.[2]

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[1] Pursuant to U.S. Sup. Ct. Rule 37.6, 28 U.S.C.A., NARUC affirms: (1) signatories authored this brief with assistance from member States, (2) no counsel for a party to the decision below, or other entity, authored this brief in whole or in part, (3) no person or entity other than NARUC contributed financially to its preparation or submission. Pursuant to U.S. Sup. Ct. Rule 37.2(a), 28 U.S.C.A., as explained by the Clerk's office, counsel of record for "respondents" and "petitioners" listed on the Court's website have consented to this filing. H. Symons for NCTA, *et al.*, M. Kellogg for BellSouth, SBC, and Verizon, *et al.*, and J. Butler for EarthLink, BrandX, California, Consumer's Union, CFA, MCI, Vermont, and the Center for Digital Democracy, directly filed letters granting permission in this docket. Copies of these filings and a separate consent letter from the U.S. Solicitor General were filed separately.

[2] See, 47 U.S.C. § 410 (1986); (Congress specified that NARUC, "the national organization of State commissions" responsible for the economic and safety regulation of utilities, nominates members to Federal-State Boards which consider universal service, separations, and related concerns and provide formal recommendations the FCC must act upon.); Cf. 47 U.S.C. § 254 (1996) (describing functions of the Federal-State Board on Universal Service). Cf. *NARUC, et al. v. ICC*, 41 F.3d 721 (D.C. Cir 1994) (where the Court explains "...carriers, to get the

The Federal Communications Commission's ("FCC") classification of cable modem service as solely an information service cannot be squared with the provisions of the Telecommunications Act of 1996.[3] The *Declaratory Ruling*, along with the companion rulemakings,[4] proposes, through the use of Title I, a new, undefined, and potentially unlimited paradigm shift in federal authority to regulate hybrid services just as information services. On its face, that proposal is inconsistent with the FCC's own precedent[5] and the statutory text.

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cards, applied to... (NARUC), an interstate umbrella organization that, as envisioned by Congress, played a role in drafting the regulations that the ICC issued to create the "bingo card" system.) See also, *USA v. Southern Motor Carrier Rate Conference, et al.*, 467 F.Supp. 471 (N.D. Ga. 1979), aff'd, 672 F.2d 469 (5th Cir. 1982); aff'd en banc, 702 F.2d 532 (5th Cir. 1983), rev'd, 471 U.S. 48 (1985). See also *Indianapolis Power and Light Co. v. ICC*, 587 F.2d 1098 (7th Cir. 1982); *Washington Utilities and Transportation Commission v. FCC*, 513 F.2d 1142 (9th Cir. 1976).

[3] *Communications Act of 1934*, as amended by the *Telecommunications Act of 1996*, 47 U.S.C. § 151 et seq., Pub.L. No. 101-104, 110 Stat. 56 (1996) (West Supp. 1998) ("1996 Act" or "Act").

[4] See, Declaratory Ruling and Notice of Proposed Rulemaking, *In the Matter of Inquiry Concerning High-Speed Access to the Internet over Cable and other Facilities, Declaratory Ruling and Notice of Proposed Rulemaking*, 17 FCC Rcd 4798 (Mar. 15 2002). ("*Declaratory Ruling*"), Pet. App. 40a - 181a. "Pet. App." refers to the corrected appendix to the petition for a writ of certiorari in No. 04-281. See also, *In the Matter of Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers*; CC Docket No. 02-33; *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review – Review of Computer III and ONA Safeguards and Requirements*, CC Dockets Nos. 95-20, 98-10, Notice of Proposed Rulemaking, (rel. Feb. 15, 2002) ("*Wireline NPRM*").

[5] See, e.g., *GTE Operating Companies Tariff No. 1*, 13 F.C.C.R. 22466 (1998) at ¶16. ("We agree that GTE's DSL . . service offering is . . properly tariffed at the federal level.") See also, *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 F.C.C.R. 24,012, 24,030, 1998 WL 458500 (1998), referenced Pet. App. 32a.

Without question, if endorsed by this Court, the undefined scope of the proposed classification scheme will generate significant uncertainty over both the FCC's authority to impose any Title II obligations on this newly "discovered" hybrid *Title I service*, as well as State authority over the underlying facilities and any voice services offered as part of an integrated package of "information services."

Aside from the possible impact on State and Federal universal service programs and oversight of rights-of-way mentioned in the FCC's March 2002 *Declaratory Ruling* and proposed rulemaking[6] for customers who communicate (both voice and data) only through an integrated DSL service, the FCC's decision in this proceeding could eliminate many protections now in place under common carriage principles and Title II of the Communications Act.[7]

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[6] See *Declaratory Ruling* seeking comment on the "extent to which . . States may regulate," at ¶8 (Pet. App. 48a)"); (the "relationship between our classification decision and statutory or regulatory provisions concerning . . . universal service," at ¶72 (Pet. App. 134a), the impact on State rights-of-way authority, at ¶96 (Pet. App. 153a), and the impact on State consumer protection rules, at ¶108 (Pet. App. 164a).

[7] In ¶72 of the *Declaratory Ruling*, Pet. App. 234a, the FCC, referencing the companion *Wireline NPRM*, states: "We note that in both proceedings, we are requesting comment on the extent to which we should exercise Title I authority to regulate the facilities-based provision of interstate information services. We seek comment regarding how our findings . . . in one proceeding should impact the other." The *Wireline NPRM* at ¶¶61-63 seeks comment on the potential impact of the new classification scheme on consumer protection requirements that apply to common carriers (i.e., providers of "telecommunications services"), including, e.g., 47 U.S.C. §258 protections against "slamming", 47 U.S.C. §214's limitations on a telecommunications carrier's ability to unilaterally discontinue service, 47 C.F.R. §§64.2001-2009 rules restricting carrier use and disclosure of customer data derived from the provision of a "telecommunications service," 47 U.S.C. §255 rules for a provider of "telecommunications service" to ensure the disabled access, 47 U.S.C. §201 obligations applicable to the furnishing of service and charges for "communication service," and §202 restrictions preventing "common carriers" from "unreasonably discriminat[ing] with regard to

This novel classification carries serious ramifications for State universal service, emergency communications, and consumer protection policies. It also implicates, and potentially undermines, both State specific programs and the Congressional charge to States (and the FCC) in the 1996 Act to promote advanced telecommunications services like the service at issue here. See, Pub. L. No. 104-104, 110 Stat. 56, § 706 (1996) (47 U.S.C. § 157 note). Earthlink, *et al.*, Br. App. 10a. For example, in Arizona, the cities of Phoenix and Tucson are dense population centers. Recent statistics place broadband deployment there by the incumbent cable provider and the phone company at record levels. However, like most other States, there are also many rural areas in Arizona with low and sometimes zero broadband penetration.[8] State Commissions, like the Arizona Corporation Commission, have a significant interest in promoting broadband deployment within their respective jurisdictions and in working with the FCC to ensure that the objectives of both the federal and State jurisdictions are achieved. This case threatens the ability of NARUC's member commissions to ensure that important objectives regarding this vital part of each State's economy can be met.

Accordingly, NARUC urges this Court to uphold the ruling below.

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like "communications services." See also *Declaratory Ruling* at ¶95 (Pet. App. 152a), asking if forbearance of Title II mandates is important "[t]o the extent cable modem service . . .[is] . . .subject to telecommunications service classification."

[8] Congressional Budget Office, *Does the Residential Broadband Market Need Fixing?*, CBO Paper, December 2003, at 7. Table 2 "Percentage of Zip Codes Nationwide with High-Speed Internet Access Subscribers, by Number of Providers" indicating that 29.3 percent of the nation's zip codes either have zero or one broadband provider. Available at: http://www.cbo.gov/showdoc.cfm?index=4868&sequence=0.

SUMMARY OF ARGUMENT

It is clear from explicit textual references in the 1996 Act, that Congress was very interested in broadband deployment issues, and, the FCC claims, in discouraging regulation. It is hard to square those concerns with the FCC's proposal to assert *sweeping and undefined* Title I authority over the "internet and other interactive computer services" through what the agency concedes is a *new approach* to defining "information service." When Congress wishes to discourage regulatory oversight, it has no difficulty specifying the modality. The FCC already has a tool specified by Congress to accomplish its goal of limited oversight – federal forbearance authority. The scheme to use Title I to create potentially unlimited federal authority to regulate these services is, on its face, inconsistent with FCC and Court precedent, Congressional intent, and plain text of the statute. This reclassification will generate uncertainty about FCC authority over such services and carries serious ramifications for State universal service, homeland security, emergency calling, and consumer protection policies.

As the FCC's 1998 explanation of DSL service illustrates, the Act lacks an exception to the imposition of Title II mandates on a telecommunications service based on integration with other services. The test for common carriage as a basis for excluding cable modem service from Title II mandates is well briefed. But *everyone agrees* that cable companies are actually providing "telecommunications." In contrast to the services involved in cases cited by petitioners, *everyone also agrees* that the *combined* product, just like its phone company analog, is clearly being offered indiscriminately and directly to all comers by the owner of the broadband transmission facilities. After conceding cable modem is a "telecommunications service" if offered on a standalone basis, it isn't a surprise that the FCC spends much of its brief attempting to support the unsupportable, i.e., the

notion that if telecommunications service and information services are "integrated" or bundled, that the "telecommunications service," along with the allied statutory mandates, simply disappears. The §153(44) definition of a "telecommunications carrier" is unambiguous on its face. The text specification that common carrier obligations only apply "*to the extent that it is providing telecommunications services*" clearly contemplates combined offerings precisely like the service at issue here. At least initially, the Department of Justice agreed. Indeed, the FCC's tortured explanation of the separate definitions found in the Communications in Law Enforcement Act (CALEA), in a related proceeding, highlight the disparity between its deficient rationale and clear statutory text. CALEA states that its provisions do NOT apply to "information services," but only to "telecommunications services." This creates a problem, because it is clear Congress expected CALEA would apply to cable modem facilities. If, as in the FCC's Title I world, cable modem can only be an "information service" with no trace of the component "telecommunications service" discernable – then CALEA cannot apply. The FCC escapes the facial inconsistency by again defining its way out of the conundrum. The FCC describes the CALEA definitions of "telecommunications services" and "information services" as "very similar" to those in §153. However, the unusual FCC approach to construction of those similar definitions maps the flawed logic of the *Declaratory Ruling* – to achieve the precise opposite result. The FCC claims, in the CALEA proceeding, that broadband Internet access service providers are wholly "telecommunications carriers," that "by *definition* cannot be providing an information service."{emphasis added} At the same time, the agency is arguing to this Court, that the "similar" definitions that apply under §153, Internet access services offered by cable companies to the public for a fee are entirely "information services" that cannot by definition contain any common carrier "telecommunications service"

element. In light of the legislative history and the statutory text, the Ninth Circuit could only conclude that the Act is susceptible only to one reasonable interpretation – that cable modem service is partly telecommunications service and partly information services. The court "did not discern any ambiguity in the statutory meaning for the agency to interpret," and thus "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a (Thomas, J., concurring). This Court should uphold the ruling of the court below.

ARGUMENT

I. THE FCC'S NOVEL ASSERTION OF TITLE I AUTHORITY IS INCONSISTENT WITH THE UNAMBIGUOUS TEXT OF THE STATUTE AND FCC PRECEDENT.

As noted *supra*, if endorsed by this Court, the undefined scope of the proposed FCC classification scheme will generate significant uncertainty over both the FCC's authority to impose any Title II obligations on this recently "discovered" and defined *hybrid Title I service*, as well as State authority over the underlying facilities and any voice services offered as part of an "integrated" package of "information services."[9]

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[9] The FCC's "Memorandum Opinion and Order" *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling*, WC Docket No. 03-211 (FCC 04-267) (rel. Nov. 12, 2004) is currently before the Ninth Circuit on State challenges to FCC's claims of exclusive jurisdiction over non-facilities based internet protocol(IP)-enabled competing phone service. Order available at: http://hraunfoss. fcc.gov/edocs_public/attachmatch/FCC-04-267A1.pdf. Cable companies already use IP-enabled services to provide phone service See, e.g., Charney, Ben, *Year in Review: VoIP's voice gets stronger* (CNET Jan. 5, 2005 - Available at http://news.com.com/Year+ in+review+VoIPs+voice+gets +stronger/200997352_3499915.html?tag=cd.hed). "[C]able companies chose to declare VoIP ready for prime time in 2004 . . .Time Warner now sells telephone service in 30 of its 31 markets." See also, Drucker, Jess, *Bells offer Free WiFi Equipment to Defend Internet Turf*, (Wall Street

The revelation that selling high speed data services to the general public for a fee, in tandem with ISP service, should be properly classified as an "information service", reverses decades of policies promoting nondiscriminatory access to networks and distorts the statutory text. As Michigan Commissioner Robert B. Nelson, Chairman of NARUC's Committee on Telecommunications, recently told Congress:

> The FCC is attempting to promote broadband deployment by minimizing the regulation of DSL and other Internet platforms. However, the agency's approach, which is based on an obvious misreading of the text of the Act, is misguided as a matter of both the law and policy. While I am sympathetic to the overall policy goal of making it easier for providers to invest in innovative technologies and services, I have serious reservations regarding the FCC's creation of a whole new federal regulatory oversight system by reclassifying services – services that even the FCC, until recently, agreed were stand-alone common carrier services regulated under Title II of the Act – as "information services."[10]

Journal July 6, 2004) at A15 " Comcast . . . to make its telephone service available to 40 million . . .Time Warner Cable . . .offer telephone service in all 31 of its markets . . .Cablevision . . .package digital cable TV, high-speed Internet access and. ..free telephone calling."

[10] *The Regulatory Status of Broadband Services: Information Services, Common Carriage, or Something In Between?: Hearing Before the House Comm. on Energy and Commerce, Subcommittee on Telecommunications and the Internet*, 108th Cong. 16-17 (2003). Statement of Robert B. Nelson, Chairman, National Association of Regulatory Utility Commissioners (Available at http://energycommerce.house.gov/108/Hearings/07212003hearing1024/Nelson1603Print.htm).

The FCC companion rulemakings on cable modem services and wireline broadband suggest some Title II obligations may ultimately attach to this putative new class of "hybrid information services."[11] However, the text of the statute clearly indicates that the FCC has *no* authority under Title I to impose common carrier obligations the Act expressly imposes only on those providing "telecommunications services" under Title II.[12] Section 153(44) specifies that:

> "A telecommunications carrier shall be treated as a common carrier under this Act *only to the extent that it is providing telecommunications services* . . ." 47 U.S.C. §153(44) {emphasis added} Earthlink, *et al.*, Br. App. 2a.

If the FCC's classification is upheld, one question left outstanding is what, if any, limitations are there to the FCC's authority to impose Title II-like or other obligations on "new" special classes of Title I "information service providers" it chooses to define.

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[11] See footnotes 6 and 7 supra.

[12] Title II, 47 U.S.C. §201 *et seq.* requires telecommunications service providers to charge just, reasonable, and non-discriminatory rates (§§201-202) (Earthlink, *et. al.*, Br. App. 4a-6a), comply with FCC investigations, complaint proceedings and fines (§§204-209), provide protection for customer information (§222), provide disabled access (§225 & §255), require compliance with Communications in Law Enforcement Act (§229), to interconnect with other carriers (§251(a) (Earthlink, *et al.*, Br. App. 6a and to contribute to the federal universal service fund (§254)(Pet. App. 211a).

The FCC points out Congress explicitly charged the FCC (and States) to "encourage the deployment on a reasonable and timely basis" of broadband capabilities to "all Americans,"[13] and gave the FCC authority to "take immediate action to accelerate deployment of such capability by removing barriers to infrastructure investment." As reiterated in the *FCC Brief* at 30, the Internet was then . . .

> "flourish[ing]" under "a minimum of government regulation," 47 USC §230(a)(4), and [the FCC] declared that the Internet should, to the extent possible, remain "unfettered by Federal and State regulation," 47 USC §230(b)(2)"[14]

It is clear from these explicit textual references in the Act cited by the FCC, that Congress was both aware of and very interested in broadband deployment issues. If the FCC is correct, Congress was also interested in discouraging regulation for "the Internet and other interactive computer services." It is hard to square those Congressional concerns and the Act's numerous specific provisions addressing both "advanced" and "information" services, with the FCC's cable modem and *Wireline NPRM* rulemakings' implied contention *that Congress wants the FCC to assert sweeping*

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[13] See, *Telecommunications Act of 1996*, §706, Pub. L. No. 104-104, 110 Stat. 153. (47 U.S.C. §157 note) Earthlink, *et al.*, Br. App. 10a. The FCC has acknowledged this directive "does not constitute an independent grant of forbearance authority or of authority to employ other regulating methods." *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order, 13 F.C.C.R. 24,012 at ¶ 69 (1988). Rather it "directs the Commission to use the authority granted in other provisions . . . to encourage the deployment of advanced services." Id.

[14] Curiously, in both cited provisions, §706 and §230, Congress specified a State role. Earthlink *et al.* Br. App. 10a. Pet. App. 210a. Cf., *Wireline NPRM* ¶3 & ¶5, *Cable NOI*, 15 F.C.C.R. at 19,288 ¶4.

and undefined Title I authority over the "internet and other interactive computer services" through what the *Wireline NPRM* concedes is a new approach to defining "information service." When Congress wishes to discourage regulation and regulatory oversight, it has no difficulty specifying the modality.[15] Indeed, as others have pointed out – the FCC already has a tool specified by Congress to accomplish its goal of limited oversight – federal forbearance authority.

II. BUNDLING AN "INFORMATION SERVICE," WITH WHAT THE FCC CONCEDES IS A "TELECOMMUNICATIONS SERVICE" IF OFFERED SEPARATELY, CANNOT IMMUNIZE A CARRIER'S FACILITIES FROM TITLE II MANDATES.

A ruling that the bundled service to the end user dictates the classification of all of its component parts is likely to result in over or under regulation of the entire service, including any applications layer. This would in fact, be directly contrary to the claimed Congressional objective to maintain a light-handed regulatory approach for Internet and information services cited by the FCC.

Moreover, it misconstrues the Act which recognizes through its definitions the various components that make up advanced services.[16] Nowhere in the Act is there an

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[15] See, e.g., 47 U.S.C §160, (Pet. App. 209a), §161, & §274(g)(2).

[16] The FCC's revised view of "information service" specifically includes what the FCC has already found to be a common carrier "telecommunications service." Other uses of the term "information service" in the Act undercut this view of Congressional intent. The Act repeatedly uses the term "information service" in the context of a consumer purchase of information delivered to the customer through a telecommunications service. See, e.g., 47 U.S.C. §228 regarding pay-per-call services where "information services" are referenced several times in the context of their purchase using "telecommunications services." The text references clearly demonstrate that the authors thought information services and common carrier services were distinct. The statute assumes two distinct players. It is the common carrier providing a "telecommunications service" that terminates service to the information service provider.

exception to the imposition of Title II mandates on a telecommunications service just because it is bundled with other services.

SBC contends the definitions in the Act, taken together, are consistent with the traditional test for common carriage, which asks (1) whether the service permits transmission of "intelligence of [the customer's] own design and choosing," and (2) whether that transmission service is offered to all comers "indiscriminately." *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 533 F.2d 601, 608-09 (D.C. Cir. 1976) (internal quotation marks omitted).[17] In the case of both cable modem and wireline DSL service, *everyone agrees* the facilities provider is actually providing "broadband transmission" or "telecommunications." In contrast to the services involved in *Virgin Island Telephone* cited at page 32 of the *FCC Brief*,[18] *everyone also agrees* that the *combined* product is clearly being offered indiscriminately to all comers, i.e., the public, by the owner of the broadband transmission facilities. After conceding cable modem is a "telecommunications service" if offered on a stand-alone basis,[19] it isn't a surprise that the FCC spends

[17] *SBC Brief* at 11. Cf. 47 U.S.C. §§ 153(43), (44), & (46) (1996). Earthlink, *et al.*, Br. App. 1a-2a.

[18] *Virgin Islands Telephone Corp. v. F.C.C.*, 198 F.3d 921, 924 (D.C. Cir. 1999. (In this case, the facilities owner did not offer any service to a class large enough to satisfy the FCC: "[The] Bureau concluded that AT&T-SSI will not be offering a service "directly to the public, or to such classes of users to be effectively available directly to the public" and that, consequently, AT&T-SSI is not a "telecommunications carrier" pFroviding "telecommunications service" under the 1996 Act." Contrast that with the situation posited in the *Declaratory Ruling* where, as the FCC concedes in its brief, if offered on a stand-alone basis, that broadband transmission meets both prongs of the common carrier test as well as the statutory definition.)

[19] *FCC Brief* at 24. ("To be sure, if a cable modem service provider made a "stand-alone offering of transmission for a fee directly to the public," Pet. App. 97a, such that subscribers could pay for and use the transmission without the information service capabilities . . .then such a

much of its brief attempting to support the unsupportable, i.e., the notion that if telecommunications service and information services are "integrated" or bundled, that the "telecommunications service," along with the allied statutory mandates, simply disappears.

NARUC respectfully suggest that the §153(44) definition of a "telecommunications carrier" is unambiguous on its face. Earthlink, *et al.*, Br. App. 2a. The text specification that common carrier obligations only apply "*to the extent that it is providing telecommunications services*" clearly contemplates combined offerings precisely like the service at issue here. In light of the legislative history and the statutory text, the Ninth Circuit could only conclude that the Act is susceptible only to one reasonable interpretation – that cable modem service is partly telecommunications service and partly information services. The court "did not discern any ambiguity in the statutory meaning for the agency to interpret," and thus "*Chevron* deference would have been inappropriate even if the agency had interpreted the statute prior to *City of Portland*." Pet. App. 27a (Thomas, J., concurring). Indeed, even the FCC ruled in 1998 that the 1996 Act did apply the *Computer II* framework to broadband[20] and conceded as much in the *Wireline NPRM*.[21] NARUC's members are not the only governmental entities to find the FCC's "new approach" inconsistent with the statute. As outlined in the September 30, 2004 *Opposition Brief of Respondent Earthlink, Inc.*, at 10-12, both the U.S. Department of Justice ("DOJ") and the Office of the Solicitor General ("SG") made public their disagreement with the FCC's new idea in a December 8, 2003 letter. After refusing to join the FCC's petition for rehearing *en banc* to the Ninth Circuit, the DOJ-SG letter to the FCC raised

provider might well be 'offering" telecommunications and thus providing a telecommunications service.")

[20] See, *Brand X Internet Services*, 345 F.3d at 1137. Pet. App. 32a.

[21] See, *Wireline NPRM* at ¶44.

concerns about the impact of the FCC's action on the application of the Communications Assistance for Law Enforcement Act, 47 U.S.C. §§ 1001 et seq. ("CALEA") to Internet-based communications. The letter directly contradicts the interpretation currently offered to this Court by the government:

> Law Enforcement advanced the theory that Internet access service is a "telecommunications service," or at least contains a "telecommunications service" that implicates the CALEA statute. . . [The] Declaratory Ruling, which classifies Internet access as a pure information service, suffers from statutory interpretation problems and directly threatens CALEA. EarthLink Opp. App. 14a.

Subsequently, DOJ pressed the FCC to expedite a separate proposed rulemaking to explain how, in light of its other rulings, CALEA could still apply to new Internet Protocol-based services.[22] Closer examination of the FCC reasoning in that proceeding is instructive as the issues that arise in that context also involve whether a carrier can simultaneously be a "telecommunications carrier" and an "information service provider." In Title II, 47 U.S.C. §229(b), requires the FCC to prescribe rules that require 47 U.S.C. §153(10), "common carriers" to comply with CALEA. Earthlink, *et al.*, Br. App. 1a. In this proceeding,

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22 *In the Matter of Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295; RM-10865, Notice of Proposed Rulemaking and Declaratory Ruling, 19 FCC Rcd 15676, 15,691-15,693 (Rel Aug. 9, 2004). (*CALEA NPRM)* at ¶¶32-36. Available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-187A1.doc.

the FCC *argues* that the CALEA definition of "telecommunications carrier" is broader than the 1996 Act definition found in 47 U.S.C. §153(44). For the FCC to present a regulatory "unified field" theory to law enforcement, the CALEA telecommunications carrier definition *has* to be broader. Why? Because CALEA applies to "telecommunications carriers" but the statute *specifically* exempts all "information services" from the application of its rules. The FCC attempts to explain it this way:

> "CALEA's definition of "information services" is very similar to that of the Communications Act. For purposes of the Communications Act, the Commission has concluded that cable modem service is an information service and has tentatively concluded that wireline broadband Internet access service is also an information service. Assuming those determinations become final, those services would, nonetheless, have to be evaluated under CALEA's separate definition of "telecommunications carrier" which, as discussed above, is broader than the definition in the Communications Act. ***Where a service provider is found to fall within CALEA's Substantial Replacement Provision it would be deemed a "telecommunications carrier" for purposes of CALEA to which CALEA obligations would apply. If, at the same time,***

> *we interpreted CALEA's Information Services Exclusion to apply, it would present an irreconcilable tension; that is, particular service providers would find themselves at the same time subject to CALEA under the Substantial Replacement Provision and exempted from it by virtue of the Information Services Exclusion.* We believe that the better reading of the statute is to recognize and give full effect to CALEA's broader definition of "telecommunications carrier" and *to interpret the statute to mean that where a service provider is determined to fall within the Substantial Replacement Provision, by definition it cannot be providing an information service for purposes of CALEA. CALEA NPRM*, 19 F.C.C.R. at 15,705-15,706, ¶50 (footnotes omitted) {emphasis added}.

The Substantial Replacement Provision cited, supra, is 47 U.S.C. §1001(8)(B)(ii)—from which "information services" are expressly excluded. In the CALEA proceeding, the FCC is proposing the precise opposite of the reasoning presented in the *Declaratory Ruling*. Earthlink, *et al.*, Br. App. 9a - 10a. The FCC claims, in the CALEA proceeding, that broadband Internet access service providers are wholly "telecommunications carriers," that "by *definition* cannot be providing an information service." *CALEA NPRM* at ¶50. Simultaneously, the agency is arguing that under the Communications Act, Internet access services offered by

cable companies to the public for a fee are entirely "information services" that cannot by definition contain any common carrier "telecommunications service" element. The literal language of 47 U.S.C. §1001(8)(C)(i) demonstrates why the CALEA construction that a telecommunications carrier "by definition" may not also provide information services crumbles under even cursory examination. It states that a "telecommunications carrier" (under either 47 U.S.C. §1001(8)(A) or (8)(B)) "does not include – (i) persons or entities *insofar as they are engaged in providing information services*." 47 U.S.C. §1001(8) (C)(i).{emphasis added} Earthlink, *et al.*, Br. App. 10a. The "insofar as" language in this section, *precisely like the "only to the extent" language in §153(44) referenced earlier in the discussion of the Communications Act's/*§153 *"telecommunications services"*, clearly reflects Congress' intent that a single entity can simultaneously provide services that bring it within the definition of "telecommunications carrier" and also provide "information services." It also clearly demonstrates, in both contexts, that if an entity meets both definitions, that entity is excluded *to the extent that it provides information services*. The text of the CALEA exemption neither compels *nor allows* the FCC's reading that a given entity must be either wholly covered by or wholly exempted from the CALEA requirements.

This tentative conclusion in the *CALEA NPRM* that once an entity meets the definition of "telecommunications carrier" it cannot possibly also offer an information service maps precisely the flawed reasoning the FCC advances in the *Cable Declaratory Order*. There, the Commission held that an entity offering an information service could not by definition also be providing the underlying telecommunications on a common carrier basis. In both dockets, the FCC fails to grasp that, by definition, *every* information service includes both an underlying transmission component and also some additional functionality. Under

neither statute does one component of the bundled service eliminate the other nor does the service thereby escape Title II obligations.

CONCLUSION

As discussed, supra, Congress has provided the FCC with the tools needed to reach the light oversight it wishes to assure applies to high-speed broadband services – federal forbearance authority. The novel definitional scheme to use Title I to create an undefined and potentially unlimited paradigm shift in federal authority to regulate hybrid services is, on its face, inconsistent with FCC precedent and the statutory text. If adopted as a basis for reversing the decision below, the undefined scope of the proposed classification scheme will generate significant uncertainty over both the FCC's authority to impose any Title II obligations on this "newly discovered" hybrid *Title I service*, as well as State authority to promote critical State programs. Based on the forgoing, NARUC respectfully requests this Court affirm the decision below.

Respectfully Submitted

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Nos. 04-277 and 04-281

IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICUS CURIAE BY THE STATE OF NEW JERSEY, BOARD OF PUBLIC UTILITIES IN SUPPORT OF THE RESPONDENTS

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INTEREST OF AMICUS CURIAE

The State of New Jersey, Board of Public Utilities ("the Board") is the local franchising authority for cable television service in the State of New Jersey and is responsible for regulation of all public utilities, including telecommunication companies, as well as cable television companies in the State. This brief is submitted in support of the determination of the Ninth Circuit, below, which decision results in the ability of the Board to provide a level of customer service and regulatory control over cable modem service which would otherwise be unavailable to the consumers of the State.

SUMMARY OF THE ARGUMENT

The State of New Jersey, Board of Public Utilities files, as an *amicus curiae*, this brief in support of the decision of the United States Court of Appeals for the Ninth Circuit, which reversed the Federal Communications Commission ("FCC") and found that cable modem service contains both an "information service" component and a "telecommunications service" component. The Ninth Circuit based its decision upon a reasonable and appropriate reading of the Communications Act of 1934, as amended, ("the Communications Act") and upon the past precedent of the Circuit Court such that the decision should be affirmed. Likewise, in light of New Jersey's extensive and recognized regulation of cable providers, and the significant and pressing need to ensure that cable modem customers in the State are afforded, at a minimum, customer service regulation, it is appropriate and reasonable for this

Court to affirm the decision of the Ninth Circuit in designating some aspect of cable modem service as being subject to regulation under Title II of the Communications Act. A regulatory scheme such as this would continue to allow New Jersey to successfully meld the concerns of technological advancement and market controls with the "traditional" regulatory role of protecting the consumer from monopolistic or quasi-monopolistic pressures and shortcomings. This foundation places New Jersey in a position to provide insight to the Court in this matter.

ARGUMENT

I. The United States Court of Appeals for the Ninth Circuit correctly found that the provision of cable modem service includes a telecommunications service component such that regulation under Title II of the Communications Act is appropriate.

The *Brand X Internet Services v. Federal Communications Commission* court found, based upon its prior decision in *AT&T v. City of Portland*, 216 *F.*3d 871 (9th Cir. 2000), that cable modem service consists of both a telecommunications service component and an information service component. This determination, in addition to following the previous decision made by the Circuit, correctly interprets and implements the intention and implications of the Communications Act. The Circuit Court reasoned that, much as in the traditional telephone-based "dial up" form of Internet access, to the extent that a cable operator provides Internet access to its subscribers over its broadband facility, "it is

providing a telecommunications service as defined in the Communications Act." *Id.* at 878, quoted in *Brand X Internet Services v. Federal Communications Commission*, 345 *F.*3d 1120, 1129 (9th Cir. 2003).

As noted in the decision of the Brand X court, *stare decisis* required the finding that cable modem service consists of both telecommunications service and information service, following upon the reasoning of the Circuit Court in *AT&T v. City of Portland*. Further, and as most clearly articulated in the concurrence filed by the Honorable Sidney R. Thomas, a reading of the Communications Act that reflects the understanding that a "single" service such as cable modem service can consist of two or more regulatory elements is entirely in keeping with the statute. 47 *U.S.C.* § 153(44) indicates that common carrier regulations extend to a telecommunications carrier, but "only to the extent that it is engaged in providing telecommunications services." This reflects an underpinning that a telecommunications provider may also provide non-telecommunications services, for example information services, such that the Communications Act reflects an understanding of a separate regulatory environment. Likewise, the pole attachment provisions contemplate that cable systems may also provide telecommunications service, 47 *U.S.C.* § 224(d)(3), and that the underlying policy of the Communications Act calls for the encouragement of "advanced telecommunications capability" such as "broadband telecommunications," Telecommunications Act of 1996, Pub. L. No. 104-104, Title VII, §§ 706(a), 706(c)(1), 110 Stat. 56, 153 (1996). As noted by Judge Thomas, this "suggests that Congress intended some component

of the 'advanced telecommunications capability' to be subject to Title II powers governing telecommunications services." *Brand X Internet Services*, *supra*, 345 *F.*3d at 1138.

The decision below, especially in light of the rationale presented in the concurrence of Judge Thomas, comports with the language and previous interpretation of the Communications Act by the Ninth Circuit, and appropriately reflects the regulatory regime under which traditional "dial up" and digital subscriber lines find themselves. *E.g.*, *In the Matter of Federal-State Joint Bd. on Universal Serv.*, 13 *F.C.C.R.* 11,501, 11,539-40, 1998 WL 166178 (1998) (noting that while ISPs are information services, they lease or otherwise acquire telecommunications from telecommunications services over traditional telephone lines); *Deployment of Wireline Servs. Offering Advanced Telecomms. Capability*, 13 *F.C.C.R.* 24,012, 24,030, 1998 WL 458500 (1998) (noting that xDSL and other forms of packet switching are telecommunication services). As such, while the Ninth Circuit failed to recognize cable modem service as a system that can be regulated as a cable service under Title VI of the Communications Act, the Circuit Court's finding of a basis for regulation under Title II of the Communications Act as a telecommunications service provides at lease some level of appropriate regulatory oversight.

II. The State of New Jersey, in its regulation of cable television and telecommunications, provides an insight into the form of regulation that would be appropriate to cable modem services and demonstrates the fallacy of finding cable modem service to be a pure information service under Title I of the Communications Act.

In addition to New Jersey's assertion that the decision of the Ninth Circuit was legally correct, the decision to provide some level of regulatory oversight to cable modem service is a sound and correct policy as well and advances the purposes and underpinnings of the Communications Act. In order to appreciate the State's interest, it is necessary to understand, at least in brief, the nature of the Board's regulatory oversight in terms of cable and telecommunications.

Under the New Jersey Department of Public Utilities Act, codified at *N.J.S.A.* 48:2-1 *et seq.*, the Board of Public Utilities has been granted "general supervision and regulation of and jurisdiction and control over all public utilities," *N.J.S.A.* 48:2-13(a), and may require any such utility company to provide "safe, adequate and proper service," *N.J.S.A.* 48:2-23. Likewise, under the New Jersey Cable Television Act of 1972, as amended, *L.* 1972, c. 186, codified at *N.J.S.A.* 48:5A-1 *et seq.* ("the Cable Act"), the Board, through its Office of Cable Television ("OCTV"), has been granted the authority over cable television companies in the State to supervise and regulate all "property, property rights, equipment, facilities, contracts, certificates and franchises so far as may be necessary to carry out the purposes of the act," *N.J.S.A.* 48:5A-9(b), subject to the

limitations of federal law, 47 *U.S.C.* § 544(a). Further, under the Cable Act, the State legislature requires the Board to ensure the provision of safe, adequate and proper service to cable television subscribers throughout the State. *N.J.S.A.* 48:5A-10.

Under the Cable Act, a "cable communications system" or a "cable communications service" consists of "any communications service other than cable television reception service delivered through the facilities of a CATV [cable television] system and for which charges in addition to or other than those made for cable television reception service are made or proposed to be made." *N.J.S.A.* 48:5A-3(f). The New Jersey legislature thereby envisioned that cable television operators would provide services other than traditional cable television service and that the Board would assume as wide a regulatory oversight role as possible over cable operators. *N.J.S.A.* 48:5A-9. This is especially true in light of one of the foundations of the Cable Act – to "promote and encourage harmony between cable television companies and their subscribers and customers." *N.J.S.A.* 48:5A-2(c)(4). Thus, this regulatory scheme, especially in terms of cable television service, has created in New Jersey a unique regulatory environment: one which successfully melds the concerns of technological advancement and market controls with the "traditional" regulatory role of protecting the consumer from monopolistic or quasi-monopolistic pressures and shortcomings. This foundation gives New Jersey particular insight in this matter.

In New Jersey, under the Cable Act, cable television regulation on the State level is a bifurcated process: the local municipality has initial control over the use of the public rights-

of-way and negotiates the municipal consent under which a cable television operator receives a non-exclusive franchise for the political subdivision. *N.J.S.A.* 48:5A-22. Once the municipality has exercised its authority, the Board, as the federally recognized local franchising authority ("LFA"), 47 *U.S.C.* § 522(10); 47 *U.S.C.* § 543, reviews the actions of the municipality and ensures compliance with State and federal cable requirements. *N.J.S.A.* 48:5A-17. Additionally, in most cases, the OCTV also serves as the "complaint officer" for the municipality, and thus receives the majority of the complaints concerning the service and other offerings of cable providers. Finally, the Board implements and regulates cable television service based upon the requirements of the federal Communications Act and the regulations promulgated by the FCC.

In New Jersey, cable modem service is available to approximately 3.8 million households, resulting in an excess of 912,000 subscribers or an average penetration of 24%.[1] Because of the aforementioned regulatory scheme in New Jersey, the Board's OCTV serves most of the municipalities in the State as the statutorily-required complaint officer. This results in thousands of calls per year, dealing with all forms of cable television service. Because of this statewide regulatory role, the typical cable television subscriber, in the event of a complaint or difficulty with a cable operator, looks to the Board for complaint resolution. Based upon the manner in which cable modem service has been advertised and integrated into the standard cable television service, as can be seen on the websites

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[1] Based upon compiled data by the OCTV as of June 30, 2004.

of most of the major operators, *e.g.* http://www.cablevision.com/, customers expect and look to the Board for resolution of cable modem service complaints or issues, even in the event such offerings are actually classified as telecommunications services.

The Board's association in the minds of subscribers with customer service as to all elements of cable services, including telecommunications services, if combined with the FCC's reading of the Communications Act, would place the Board in a difficult position: as the "front-line" customer service entity, most subscribers, legislators and elected officials expect some level of regulation by the Board, yet a determination of cable modem service as being entirely an "information service" places the process outside of any jurisdiction of the Board. This example illustrates one problem: in January, 2002, the Internet service provider ("ISP") Excite@Home filed for bankruptcy and caused Comcast, who had a relationship with the company, to transfer all of its Internet services to a new facility. Over a six-day period, the Board's staff received in excess of 2,200 complaint calls related to the failure of the network conversion. While the Board attempted to take what steps it could to help in the transition, and while Comcast behaved in an appropriate manner and cooperated with the State during the transition, the Board was nevertheless at the mercy of the cable operator and without any regulatory foundation to require the cable operator to even meet to discuss the issues with Board staff, much less to act based upon the Board's suggestions or requests.

Traditionally, the OCTV and the Board have taken a vigorous approach to protecting the customers of cable television operators and telecommunications services, and would, if given the opportunity, do the same for cable modem service customers. Under the Board's customer service regulations, the OCTV and the Board ensure regular notice to customers of charges, channel changes, upgrades and deletions, tariff information, and other information, *e.g.*, *N.J.A.C.* 14:18-3.18; enforce service call schedules, *N.J.A.C.* 14:18-3.12; require automatic outage credits, *N.J.A.C.* 14:18-3.5; and help to ensure proper billing and termination procedures, *N.J.A.C.* 14:18-3.8 – 3.11. In each of these cases, the Board serves to ensure that both the customer and the cable operator are treated fairly and to moderate the relationship between provider and customer in a reasonable and fair manner. Likewise, telecommunications services have also been regulated, within the limit of federal law, by the Board, albeit not through the OCTV. The Board continues to impose customer service protection requirements upon telecommunications providers, including issues of deposits for service, *N.J.A.C.* 14:3-7.1; billing disputes, *N.J.A.C.* 14:3-7.13; and termination of service, *N.J.A.C.* 14:3-7.17. Thus, the Board has and continues to exercise, to the extent possible, its regulatory authority over cable and telecommunications services, and would propose to continue to do so with cable modem service.

Currently, under the FCC's definition under review, the Board is unable to provide this level of customer protection to cable modem service customers, although the decision of the Ninth Circuit to allow for Title II regulatory treatment would allow that to change. While the Board would, in a vacuum and

as a policy matter, call for the regulation of cable modem service under the auspices of Title VI (47 *U.S.C.* § 521 *et seq.*) of the Communications Act, the Board is satisfied that, in light of the decision of the Ninth Circuit, and the Board's support of that decision, regulation under Title II (47 *U.S.C.* § 201 *et seq.*) as a common carrier provides the appropriate possibility of local regulatory control such that the Board will retain its ability to protect customers as it currently is required to do and consistent with the purposes of the Communications Act.

As such, the Court should provide that the local regulatory authority, in this case the Board, is allowed sufficient jurisdiction over cable modem service to ensure that customer service elements, at a minimum, are regulated and enforced. The Board wishes to take as active a role as allowed under federal statute, and believes that the Ninth Circuit's decision, in addition to setting forth an appropriate legal foundation, best reflects the legislative intent of both the federal Act as well as the New Jersey legislative mandate to ensure that customers and the cable modem service providers are afforded an opportunity for consumer protection coupled with the continued encouragement of innovation and competition.

CONCLUSION

In light of the sound legal foundation supporting the decision of the Ninth Circuit in this matter, as well as the clear policy foundations for providing some limited regulation over cable modem service, at least as to customer service requirements, the Board respectfully joins with those parties

calling for this Court to affirm the decision of the Ninth Circuit below.

Respectfully submitted,

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IN THE

Supreme Court of the United States

NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION, *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

FEDERAL COMMUNICATIONS COMMISSION AND
THE UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

BRIEF OF *AMICUS CURIAE* TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF *AMICUS CURIAE* TELECOMMUNICATIONS INDUSTRY ASSOCIATION IN SUPPORT OF PETITIONERS

INTEREST OF *AMICUS CURIAE*

The Telecommunications Industry Association ("TIA") respectfully submits this brief *amicus curiae* in support of petitioners.[1]

[1] Pursuant to Rule 37.6, *amicus* certifies that no counsel for any party authored this brief in whole or in part. No persons other than *amicus curiae* or their counsel made a monetary contribution to the preparation or

TIA is a trade association comprised of 700 member companies that manufacture or otherwise supply some of the most sophisticated technology products and services used in both the telecommunications and information services industries. Its membership ranges from large multi-national corporations that generate hundreds of millions of dollars in revenue to smaller niche providers of highly specialized products and services.

As the designers and manufacturers of the equipment and other technology products that make information services possible, TIA members are directly affected by changes in the regulatory environment for those services. TIA members and their customers currently operate in an unregulated information services market that responds rapidly and efficiently to shifts in consumer demand and rewards a high level of innovative product development. TIA and its customers have considerable expertise regarding when (and which) features and functions of technology products can expose customers to the more burdensome regulations that apply to providers of "telecommunications." TIA members therefore have an interest in maintaining the stability and continuity of the Federal Communication Commission's policies governing the nature and marketability of their products.

TIA supports legislative and regulatory efforts that encourage the rapid deployment of advanced telecommunications services to all Americans and promote investment in appropriate infrastructure to ensure delivery of such products and services. The members of TIA have a vital interest in ensuring that the markets for all forms of communications technology products and services remain competitive, hospitable to new investment, and appropriately regulated, to

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submission of this brief. Letters reflecting the consent to the filing of this brief by all parties named in the Court's docket have been submitted to the Clerk under separate cover.

maintain incentives for investment in new infrastructure and in innovative products and service offerings.

SUMMARY OF ARGUMENT

Cable modem services provide customers with high-speed (or "broadband") Internet access. But Internet access services constitute only a small fraction of the rich array of computer-enhanced data management and data processing services offered as "information services" in today's information technology market. As the result of a landmark decision in the FCC's *Computer Inquiry* proceeding[2] nearly twenty-five years ago, information services, or "enhanced services" as they were then known, have flourished in a robustly competitive, unregulated market. The FCC drew a critical distinction in that proceeding between enhanced services and so-called "basic services," (now known as "telecommunications"). The FCC concluded that basic and enhanced services fall into two separate and distinct service categories, have separate and distinct competitive characteristics, and are therefore subject to different sections of the Communications Act. While basic telecommunications services are subject to common carrier regulation under Title II of the Act, enhanced or information services are not.

Despite the differences between the two types of service, the FCC recognized that many information services include not only data and computer processing capabilities but also a basic telecommunications component. Data storage and retrieval services, for example, often use telecommunications links to interconnect remote databases and deliver retrieved data to a single point of contact with the customer of the service. The FCC therefore included within the category of unregulated enhanced services those services that include a

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[2] The *Computer Inquiry* proceeding is discussed in greater detail in section I. B., *infra*, at 7-11.

basic service component if, as a functional matter, the basic service is so integrated into the final product that the consumer receives a single integrated offering. The FCC's approach to defining and regulating basic and enhanced services has since been codified through the statutory definitions of "information services" and "telecommunications" which were added to the Communications Act by Congress in the 1996 Telecommunications Act.

Applying those statutory definitions to cable modem service, the FCC concluded in its declaratory ruling that, like all other Internet access services, cable modem service is an information service because the telecommunications component of the service is an integral, inseparable part of a single comprehensive offering. Cable modem customers cannot obtain Internet access without that telecommunications component, and they cannot use the telecommunications component for any function other than Internet access.

Because cable modem service provides customers with a single integrated offering, it does not provide a "telecommunications service" any more than a baker includes an offering of flour, and thereby becomes a miller, by selling a cake.

The Ninth Circuit decisions under review mischaracterize cable modem service by artificially isolating an otherwise integrated transmission component and concluding that cable modem service providers offer a telecommunications service. That conclusion undermines long-standing FCC precedent and the statutory provisions codifying that precedent which were included in the 1996 Act. If the Ninth Circuit decisions are allowed to stand, the vast majority of contemporary information service providers, that have never been deemed providers of telecommunications, would face potential regulation as a result of the integrated transmission components in their information service offerings.

Finally, the statutory purposes and policy objectives of the Communications Act are furthered by the FCC's classification of cable modem service as an information service and are undermined by the regulatory threat that results from the Ninth Circuit's decisions. In the 1996 Telecommunications Act, Congress directed the FCC to encourage the deployment of broadband services by removing barriers to infrastructure investment, and to preserve the competitive free market for the Internet, unfettered by Federal or state regulation. The Ninth Circuit's decisions do just the opposite. By exposing cable modem service providers to the threat of federal regulation as Title II common carriers, the decisions create barriers to competitive entry by cable systems and discourage cable systems from investing in the broadband infrastructure required for emerging Internet-based and other information services.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION UNDERMINES WELL-ESTABLISHED STATUTORY INTERPRETATIONS AND REGULATORY POLICIES

The Ninth Circuit's decisions in *Brand X Internet Services, et al. v. FCC,* Pet. App. 2a, and *AT&T Corp. v. City of Portland,* 216 F.3d 871 (9th Cir. 2000), advance a new interpretation of the definitions for "telecommunications" and "information service" in the Communications Act of 1934, 47 U.S.C. §§ 151 *et seq.,* (the "Act"), that re-draws the boundary between regulated telecommunications services and unregulated information services. The appeals court's new interpretation disregards a twenty-five year-old body of regulatory law interpreting the Act and would adversely affect far more than the nascent market for residential high-speed access to the Internet that was the focus of the decision below. The market for what the Act calls "information services" covers much more than cable modem service, including a wide

variety of products and services that play crucial though less visible roles in the proper functioning of the national economy. The vitality of that market would be severely compromised—and the rate of technology diffusion would be substantially impaired—by the profound and abrupt disruption of the statutory scheme and the Federal Communications Commission's ("FCC") regulatory framework that would result if the Ninth Circuit's decision were to stand.

A. The definitions in the Communications Act determine the scope of the FCC's jurisdiction over cable modem service

The definitions in the Communications Act for "telecommunications" and "information services" frame the FCC's regulatory authority over cable modem service. Section 3(43) of the Act defines "telecommunications" as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). An "information service" is defined in Section 3(20) of the Act as the "offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

The Act defines the services from the customer's perspective; the definitions refer to the functions offered to the end user, not the facilities that a vendor may use to produce or deliver those functions. *See also* 47 U.S.C. § 153(46) (defining "telecommunications service" as the offering of telecommunications to the public for a fee "regardless of the facilities used"). Accordingly, a service can fall within the

definition of an information service whether the service uses cable network facilities or traditional telephone network facilities. Moreover, by defining an "information service" as a capability that is provided "via telecommunications," the Act specifically recognizes the intertwined nature of the basic transmission services that constitute "telecommunications" and the data processing functions that information service providers ("ISPs") combine with telecommunications to create an information service.

B. Cable modem service is an "enhanced" or "information service" under long-standing FCC precedent interpreting the Act's definitions

The FCC's application of these statutory definitions in its *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Internet Over Cable Declaratory Ruling; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Pet. App. 40a, (*"Declaratory Ruling"*), is consistent with both the long-standing regulatory framework for the services that fall within these definitions and the functional role of telecommunications in the provision of contemporary information services.

As the appeals court below acknowledged in *Brand X,* Pet. App. at 6a, the Act's 1996 definitions for telecommunications and information services[3] track the FCC's answer to a question posed nearly twenty-five years ago in its *Computer II* rulemaking:[4] where is the dividing line between traditional

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[3] "Information services" is "the codified term for what the FCC first called 'enhanced services.'" *City of Portland*, 216 F.3d 871.

[4] *Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry)*, Final Decision, 77 F.C.C.2d 384 (1980) (*"Computer II Final Decision"*), *on reconsideration*, Memorandum Opinion and Order, 84 F.C.C.2d 50 (1980) and Memorandum Opinion and Order on Further Reconsideration, 88 F.C.C.2d 512 (1981), *aff'd sub nom. Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198

telecommunications and the emerging data processing services that use telecommunications services to create new technology products and services? The FCC initiated the *Computer II* proceeding because it recognized the "regulatory problems raised by the confluence of communications and data processing," *Computer II Final Decision,* 77 F.C.C.2d at 386, para. 2, and the "greater utilization of computer processing technology and its varied market applications." *Id.* at 385, para. 1. The FCC addressed those problems in part by dividing the communications world into services classified as either "basic" or "enhanced," categories that were essentially re-named and codified by the 1996 amendments to the Act as "telecommunications," which corresponds to basic service, and "information services," which corresponds to enhanced services.[5]

(D.C. Cir. 1982), *cert. denied sub nom. Louisiana Public Serv. Comm'n v. FCC*, 461 U.S. 938 (1983). *See generally Declaratory Ruling*, at Pet. App. 89a n.139 and decisions cited therein.

[5] In its First Report and Order and Further Notice of Proposed Rulemaking in *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, 11 F.C.C.R. 21905 (1996) ("*Non-Accounting Safeguards Order*"), *request by FCC for voluntary remand granted, Bell Atlantic Tel. Cos. v. FCC*, No. 99-1479, 2000 U.S. App. LEXIS 35367, at *1 (D.C. Cir. Oct. 27, 2000), Order on Remand, 16 F.C.C.R. 9751 (2001), the Commission concluded that the statutory term "telecommunications service" corresponds to the Commission's *Computer II* definition of a basic service, the statutory term "information service" corresponds to the definition of an enhanced service, and all of the services considered by the Commission to be "enhanced services" are "information services" as defined in the Act. *Non-Accounting Safeguards Order,* 11 F.C.C.R. at 21955-58, paras. 102-07. The Commission found that, like basic services and enhanced services, telecommunications services and information services are separate and distinct categories, with Title II regulation applying to telecommunications services but not to information services. *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R. 11501, 11507-08, 11516-17, paras. 13, 33 (1998) ("*Universal Service Report*").

The Commission defined basic service as the offering of a "pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information." *Computer II Final Decision*, 77 F.C.C.2d at 420, para. 96. Enhanced service was a service that "*combines basic service* with computer processing applications [that] . . . act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information, or provide the subscriber additional, different, or restructured information, or involve subscriber interaction with stored information." *Id.* at 387, para. 6 (emphasis added).

In the decision adopting these definitions, the Commission highlighted the role of "basic" service (now "telecommunications") as an integrated component in many "enhanced" (now "information") services, defined the category of enhanced services broadly to include such integrated services, and expressly declined to treat enhanced services differently from one another based on whether they did or did not have a basic or telecommunications component. Indeed, the FCC itself had originally proposed in the *Computer II* proceeding to differentiate among enhanced services on that basis but, after amassing and reviewing an extensive record, abandoned the proposal for a number of reasons:

> We have gone to great length in this proceeding to build a record which would best enable us to render a decision consistent with the mandate . . . in Section 1 of the Communications Act. Based on this record, the mandate of this Commission in a rapidly changing technological environment, the market developments resulting from the confluence of technologies, the impossibility of defining at the enhanced level a clear and stable point at which "communications" becomes "data processing," the ever increasing dependence upon common carrier transmission facilities in the movement of information, the need to tailor services to individual user require-

ments, and the potential for unwarranted expansion of regulation, we conclude that the public interest would not be served by any classification scheme that attempts to distinguish [among] enhanced services based on the communications or data processing nature of the computer processing activity performed. Accordingly, we conclude that all enhanced computer services should be accorded the same regulatory treatment and that no regulatory scheme could be adopted which would rationally distinguish and classify enhanced services as either communications or data processing.

Id. at 428, para 113. The FCC recognized that its approach reduced the regulatory requirements applicable to enhanced services, even when such services included a telecommunications component, but concluded that:

> the nature of enhanced services and their market underscores the reasonableness of our decision. As indicated, we do not believe these are communications common carrier services within the meaning of Title II. We acknowledge, of course, the existence of a communications component. And we recognize that some enhanced services may do some of the same things that regulated communications services did in the past. On the other side, however, is the substantial data processing component in all these services.

Id. Accordingly, the Commission concluded that there was "no need to assert regulatory authority over data processing services *whether or not such services employ communication facilities* in order to link the terminals of the subscribers to centralized computers. We believe the market for these services will continue to burgeon and flourish best in the existing competitive environment." *Id.* at 433, para. 127, citing *First Computer Inquiry*, Tentative Decision, 28 F.C.C.2d at 298, para. 22 (emphasis in *Computer II Final Decision*).

The Commission also recognized that transmission and data processing technologies would continue to converge in

the future and consciously crafted a flexible definition of enhanced services that would allow ISPs to incorporate transmission functions into their information services without becoming regulated telecommunications providers:

> As the market applications of computer technology increase, communications capacity has become the necessary link allowing the technology to function more efficiently and more productively. . . . As a result, the computer industry and the communications industry are becoming more and more interwoven. We believe, and the record shows, that this trend will become even more pronounced in the future. . . . Thus, the pressure on a set of administrative rules which fail to recognize the growth in operational sophistication demanded by our nation's economy will be inexorable.

Computer II Final Decision, at 422, para. 100.

Just as the FCC foresaw in 1980, telecommunications services have become an integral component of most contemporary information services. This is particularly true for Internet-based services, because the Internet itself results from the interconnection of individual computers by means of various telecommunications products and services, in combination with sophisticated protocol conversion and data processing services. By attempting to impose an artificial separation between an information service and the telecommunications that is an ingredient of that information service, the *Brand X* decision ignored the body of law that has developed around the FCC's classification scheme as well as the robust market for sophisticated information services and technologies that has emerged in the context of the FCC's regulatory treatment of information and telecommunications services.

Under the FCC's rulings described above, the service at issue in this case clearly falls within the statutory definition of an information service. Cable modem service provides

subscribers with Internet access, which the Commission has categorized in other contexts as an information service because the subscriber receives a single, integrated service that combines computer processing, information provision, and computer interactivity with data transport, enabling end users to run a variety of applications. *See Federal-State Joint Board on Universal Service*, Report to Congress, 13 F.C.C.R 11501, 11539-40, para. 80 (1998) ("*Universal Service Report*").

Applying the same analysis to the Internet access provided by cable modem service, the FCC correctly concluded that the service constitutes an information service under the Act, like other Internet access services. The FCC found that cable modem service is presented to customers as a single integrated service, Pet. App. at 95a, para. 38,[6] that combines a number of information service functions. The integrated nature of the service is perhaps demonstrated most clearly by the fact that customers cannot use the telecommunications

[6] This fundamental factual finding by the FCC in the *Declaratory Ruling*, which is the necessary starting point for any determination of the proper classification of cable modem service under the Act, was not available, of course, to inform the court's analysis in the *City of Portland* decision. And, as the FCC has stated previously,

> the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service. It is plain, for example, that an incumbent local exchange carrier cannot escape Title II regulation of its residential local exchange service simply by packaging that service with voice mail. . . . But the matter is more complicated when it comes to offerings by facilities-based providers [such as cable systems]. . . . '[T]he issue is whether, functionally, the consumer is receiving two separate and distinct services.'

Universal Service Report, 13 F.C.C.R. at 11530, para. 60 (citations omitted).

component of cable modem service for any function other than accessing the Internet.

The FCC identified several information service functions that are components of cable modem service, including computer processing of data, the retrieval of information for the customer, and computer interaction with data transport, enabling end users to run a variety of applications.[7] *Declaratory Ruling*, Pet. App. at 91a, para. 36; *id.* at 56a n.43. In addition, as the FCC explained in the *Declaratory Ruling*, cable modem service provides subscribers with access to the Internet's domain name system ("DNS"), a "capability for . . . acquiring, . . . retrieving, . . . [and] utilizing" information, 47 U.S.C. § 153(20), that is central to the functioning of the Internet.[8] The FCC also found that cable modem service requires protocol conversion and IP address assignments. *Declaratory Ruling*, Pet. App. at 64a, para. 17 nn.72-73.

Because each of these functions qualifies individually as an "information service" under the Act, the FCC concluded that the provision of all these functions in a single service also constitutes an "information service." *Id.* at 93a-95a, para. 38. Based on these characteristics of the service, the FCC properly found that cable modem service "as currently provisioned", *id.* is an "information service" under the Act.

[7] Examples of the applications typically offered to customers of cable modem service include e-mail, newsgroups, and the ability to create a web page. *Declaratory Ruling*, Pet. App. at 91a-95a, para. 37.

[8] The DNS is an on-line data retrieval and directory system that allows Internet routers to consult databases listing the numeric IP addresses that correspond to the alphabetic domain names used to identify web sites. One of the key functions of Internet access services like cable modem service is to provide customers with access to the information stored in the DNS databases. In other words, Internet access customers receive a data base retrieval service, the quintessential information service. *Declaratory Ruling*, Pet. App. at 91a, para. 37.

C. Cable modem service does not provide subscribers with a telecommunications service

The *Declaratory Ruling* also concluded that cable modem service does not, as a factual matter, include an offering to subscribers of a "telecommunications service," as defined by the Act. The FCC found that the telecommunications component of cable modem service is an integral, inseparable part of a single comprehensive offering. The FCC also found that cable systems do not currently offer,[9] on a "separate and distinct" basis, the underlying facilities-based transmission service they use to provide Internet access. *Id.* n.154.

Because cable modem service provides telecommunications only as a component that is inseparable from the data processing capabilities that make it an information service, the FCC was correct to conclude that the service does not include an offering of a "telecommunications service," any more than a baker includes an offering of flour, and thereby becomes a miller, by selling a cake.

D. The Ninth's Circuit's interpretation of the Act would expose the vast majority of information service providers to a significant regulatory risk

The FCC's interpretation of Section 3(20), 47 U.S.C. § 153(20), in the context of cable modem service is applicable to many, if not most, of the other information services available to consumers. Contemporary information services can, and typically do, include a transmission component that is obtained by the information service provider and provided to its customer as part of an integrated information service. Under the interpretation of Section

[9] The Commission emphasized that its finding applied to cable modem service "as currently provisioned," *Declaratory Ruling*, Pet. App. at 95a, para. 38; "as provided to the end user," *id.*, Pet. App. at 96a, para. 39.

3(20) that results from the *Brand X* decision, however, a broad variety of information service providers that have never been deemed providers of telecommunications would be exposed to regulation because the telecommunications component of their information services would be recharacterized as an offering of telecommunications under Section 3(43), 47 U.S.C. § 153(43).

An instructive example is the credit card validation service provided to merchants by credit card issuers. These services use secure, private data networks that connect point-of-sale terminals located at merchants' premises to remote databases that store account information. Those data networks may include transmission facilities owned and operated by the card validation service provider or transmission services obtained by the service provider from common carriers. Without the telecommunications component, card validation services could not exist. Yet under the interpretation of "information service" that results from the *Brand X* decision, providers of credit card validation services would be classified as providers of both information service and telecommunications, contrary to the FCC's long-standing regulatory treatment of such services as pure information services.[10]

The Court of Appeals' interpretation of Section 3(20) of the Act, 47 U .S.C. § 153(20), would also impose adverse and almost certainly unintended consequences on other purchasers of telecommunications service that are not ISPs. Businesses that purchase toll-free service, for example,

[10] The *City of Portland* decision suggested that "control[] ...of the transmission facilities between ... subscribers and the Internet" was unique to cable modem service and distinguished it from other information services. 216 F.3d at 878. As the credit card validation example demonstrates, however, this is not an accurate characterization of other information services, many of which involve or even require the ISP's control of transmission facilities all the way to the customer's premises.

provide telecommunications service to callers when callers use the service to retrieve information from the toll-free purchaser (*e.g.*, airline reservation status information, customer service and product support). Under the Ninth Circuit's interpretation of Section 3(20), businesses that provide, via their purchase of toll-free service, the telecommunications connection used by their customers for database look-ups or other information retrieval would become providers of telecommunications subject to regulation by the FCC. Under the FCC's interpretation of the statutory definition in the *Declaratory Ruling*, however, the toll-free services provided by such businesses to their customers would continue to be treated merely as a component in the provision of a non-telecommunications service.

Thus the *Brand X* decision is problematic not only because it incorrectly classifies cable modem service under the Act but also because it effectively mandates the re-classification of a wide body of information services whose providers have long been considered outside the reach of the FCC's Title II jurisdiction over telecommunications providers.

II. THE FCC'S CLASSIFICATION OF CABLE MODEM SERVICE AS AN "INFORMATION SERVICE" SATISFIES THE STATUTORY PURPOSES AND POLICY OBJECTIVES OF THE COMMUNICATIONS ACT

The FCC's classification of cable modem service as an information service under Section 3(20) of the Act complies with the statutory mandates, and is necessary to achieve the policy objectives, established by Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), and in the 1996 Act's amendments to the Communications Act of 1934. In Section 706 of the 1996 Act, Congress recognized the significant evolution in the country's communications needs since the passage of the

Communications Act in 1934 and the value of ubiquitous public access to advanced telecommunications capabilities. *Declaratory Ruling*, Pet. App. at 47a, para. 4 n.14. Accordingly, Section 706 directs the FCC to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans. . . ." 1996 Act § 706 (reproduced in the notes to 47 U.S.C. § 157). It requires the FCC to promote this deployment through certain specific methods, including "regulatory forbearance, measures that promote competition . . . or other regulating methods that remove barriers to infrastructure investment."[11] *Id.*

In addition to promulgating Section 706, Congress added Section 230(b)(2) to the Act to provide guidance to the FCC regarding the appropriate treatment of emerging Internet-based services. Section 230(b)(2) declares it the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2).

A. The FCC's principles for interpreting the Act are consistent with the Congressionally-mandated objective of encouraging the deployment of advanced services

In order to encourage the rapid deployment of broadband services and preserve the free market for Internet services in keeping with its Congressional mandate, the FCC identified certain "overarching principles" that it uses to guide its interpretation and application of the Act. The Commission

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[11] *See also United States Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C.Cir. 2004) (in rulemaking to implement Section 251(d)(2) of the Act, FCC can consider whether new rules would create excessive impediments to infrastructure investment because "Section 706(a) identifies one of the Act's goals beyond fostering competition piggy-backed on ILEC facilities, namely, removing barriers to infrastructure investment.").

used these principles to interpret the Act's definitions and determine whether cable modem service should be treated as a telecommunications service or an information service. *Declaratory Ruling*, Pet. App. at 46a, para. 4. The Commission's principles are consistent with the statutory objectives imposed by Congress and ensure that the FCC's decision to classify cable modem service as an "information service" will serve the policy goals identified by Congress.

1. *Encouraging the ubiquitous availability of broadband services*

The FCC has declared that its primary policy goal is to "encourage the ubiquitous availability of broadband for all Americans." *Id.* (citing *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, Notice of Proposed Rulemaking, 17 F.C.C.R. 3019, 3021, para. 3 (2002) ("*Wireline Broadband NPRM*")). The FCC has identified widespread deployment of broadband infrastructure as "the central communications policy objective of the day" because it is likely to "bring valuable new services to consumers, stimulate economic activity, improve national productivity, and advance economic opportunity for the American public." *Id.* at 3021, para. 1. The ubiquitous deployment of broadband services is therefore essential to enhancing the pace of technological progress and maintaining the nation's continued economic expansion.[12]

[12] The executive branch has identified widespread broadband deployment as an important national priority, *see* White House, *A New Generation of American Innovation* 11 (Apr. 2004), *available at* http://www.whitehouse.gov/infocus/technology/economic_policy200404/innovation.pdf, and President George W. Bush has emphasized the benefits resulting from such deployment. *Id.; see also Improving Right-of-Way Management Across Federal Lands to Spur Greater Broadband Deployment*, Mem. For the Heads of Exec. Dep'ts, and Agencies 40 Weekly Comp. Pres. Doc. 696 (May 3, 2004) ("Broadband has the potential to bring new services and products to American consumers and businesses postering innovation, investment and job producing growth.").

The Commission's goal of encouraging ubiquitous broadband availability implements the Congressional directive in Section 706 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 1996 Act § 706. Indeed, should the Commission determine that advanced telecommunications capabilities are not being deployed to all Americans in a timely fashion, the Commission is directed to take immediate action to accelerate deployment. By seeking ubiquitous availability for broadband services through its interpretation and applications of the Act, the Commission is acting in accordance with its Congressional mandate.

2. *Creating a minimal regulatory environment*

To achieve the deployment objectives of Section 706, the Commission concluded that its policies and regulations must promote investment in advanced services and broadband facilities. Section 706 directs the Commission to remove barriers to such infrastructure investment if it determines that advanced telecommunications capabilities are not being deployed in a reasonable and timely fashion.

In the *Declaratory Ruling*, the Commission reiterated its commitment to "a minimal regulatory environment" for broadband as the best means of promoting investment and innovation. Pet. App. at 47a, para. 5, citing *Wireline Broadband NPRM*, 17 F.C.C.R. at 3022, para. 5. The Commission had previously recognized that substantial investment will be required to build out the advanced networks that can support new and innovative broadband applications and capabilities. *Id.* But the Commission also concluded that regulatory uncertainty or the threat of unnecessary or unduly

burdensome regulatory costs can discourage such investment and undermine the competitive free market for Internet services. *Id.* Moreover, a heavy-handed regulatory approach would run afoul of the Congressional mandate in Section 230(b)(2) of the Act to preserve a market for Internet and other "interactive computer services" that is unfettered by Federal and State regulation. Accordingly, the Commission's reliance on the investment-stimulating effects of a minimal regulatory environment is consistent with Congressional objectives.

3. *Applying an even-handed analytical approach to different technologies*

The Commission observed in the *Declaratory Ruling* that different technologies and network architectures for broadband access services are emerging from multiple platforms in addition to cable modem service, such as residential DSL service over wireline, terrestrial wireless technologies, and satellite services. Pet. App. at 48a, para. 6. The FCC concluded that its treatment of broadband services must be consistent, to the extent possible, across multiple technology platforms in order to promote their development, and thus competition, in the provision of broadband capabilities. Competitive investments in these multiple platforms ensure that the needs and demands of the consuming public will be met efficiently. By using an analytical approach that is, "to the extent possible, consistent across multiple platforms," *id.*, the FCC can also ensure that its decisions further the Congressional objective of promoting the deployment of high speed telecommunications capabilities "without regard to any transmission media or technology." 1996 Act § 706.

B. The FCC's interpretation of Section 3(20) and classification of cable modem service as an information service is consistent with the Act's policy objectives and the FCC's principles for achieving those objectives

By classifying cable modem service as an information service, subject to minimal regulation under Title I of the Act, the FCC's declaratory ruling serves the statutory objectives in Sections 706 of the 1996 Act and 230(b)(2) of the Act. The decision eliminates regulatory uncertainty, regulatory barriers to infrastructure investment, and burdensome regulatory compliance costs which could otherwise discourage the deployment of competitive broadband facilities and thus slow the pace of technological progress and economic expansion.

The FCC's classification of cable modem service as an information service is also consistent with each of its overarching principles for ensuring compliance with the policy objectives of the statute, namely, that the FCC's rules and policies encourage ubiquitous deployment of broadband technology, that broadband services be provided in an environment with minimal regulation, and that any regulation apply consistently across multiple technology platforms.

The FCC's ability to achieve these objectives would be undermined substantially if this Court allows the Ninth Circuit to override the FCC's classification of cable modem service as an information service and instead requires the FCC to regulate cable modem service as a telecommunications service. That regulation would impose a significant burden on providers and potential providers of cable modem service and similar Internet access services. It would discourage competitive investment in the broadband infrastructure required for emerging Internet-based and other information services. It would discourage expansion of existing broadband networks to reach currently unserved areas, thwarting the FCC's efforts to achieve ubiquitous

deployment in accordance with its statutory mandate. It would undermine the development of new and innovative services and reduce consumer choice.

Most importantly, it would fundamentally change the deregulatory regime governing all information service providers, increasing the costs of existing services and chilling the development of new, innovative, and heretofore unregulated information services.

CONCLUSION

For the foregoing reasons, the decision of the court of appeals should be reversed.

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NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION *et al.*,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents,

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,
Petitioners,

v.

BRAND X INTERNET SERVICES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF *AMICUS CURIAE* OF WASHINGTON LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*

The Washington Legal Foundation (WLF) is a public interest law and policy center based in Washington, D.C., with supporters nationwide.[1] While WLF engages in litigation and administrative proceedings in a variety of areas, WLF devotes a substantial portion of its resources to defending free enterprise, individual rights, and a limited and accountable government. To that end, WLF has frequently appeared as *amicus* in this and other federal courts to address the proper scope of the telecommunications laws and other federal laws as they apply to the telecommunications industry and the Internet. *See, e.g.*, *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster* (No. 04-480) (supporting petition for certiorari); *Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). WLF's Legal Studies Division also publishes policy papers educating policymakers and practitioners regarding these subjects. *See, e.g.*, Kristen J. Mathews, *Understanding and Complying With The "CAN-SPAM" Act* (2004); Prof. Richard A. Epstein, *"Digital Rights Management" Best Left To Private Contract* (2002); Steven G. Bradbury and Grant M. Nixon, *Court Ruling Wrongly Creates New Right To Sue Telecom Companies* (2002). WLF is concerned that the decision below, if not reversed, will stifle the FCC's efforts to reconsider burdensome "common carrier" regulations with respect to Internet broadband providers.

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[1] Pursuant to Supreme Court Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and that no person or entity, other than *amicus* and its counsel, contributed monetarily to the preparation or submission of this brief.

Respondents have lodged a blanket letter of consent to *amicus* briefs with the Clerk of the Court. Letters from Petitioners consenting to the filing of this brief have also been lodged with the Clerk.

ARGUMENT

The Broadband Market Is Highly Competitive, Rendering Unnecessary "Common Carrier" Obligations Such As Those Mandated Under the Ninth Circuit's Decision

Respondents Brand X Internet Services and Center for Digital Democracy (CDD) raise the specter of high concentration in the broadband market. Opp. at 2 & n.14. CDD has elsewhere maintained that if the Ninth Circuit's decision is reversed, and cable broadband providers are not required to serve as common carriers to other Internet Service Providers (ISP's), then "cable companies will be able to block content at will for political and financial reasons and deny the public the ability to choose among competing Internet providers." *Cable Has to Like 'Brand X' Chances*, Multichannel News, Jan. 3, 2005, at 8.

The resolution of this policy argument is properly the province of the Federal Communications Commission, not the federal courts. It may be of benefit to this Court, however, to be aware of the broader economic context of this case, and in particular, of the facts that render CDD's policy arguments groundless.

The reality is that cable companies (providers of cable modem service) and phone companies (providers of DSL service) are locked in an intense competition for residential broadband subscribers. Jube Shiver Jr., *Broadband Market Is About to Heat Up*, June 17, 2004, at C1. *See also Cable Executives Gear Up for Bigger Competitive Onslaught*, Communications Daily, Jan. 14, 2005 ("cable executives are running scared these days").

As of June 30, 2004, roughly 60% of households with broadband used cable modem. Local telephone companies have been responding with substantial price cuts for their existing

Digital Subscriber Line ("DSL") service and are making major capital investments in fiber-optic transmission facilities. Reinhardt Krause, *Cable TV Companies Take Back Spotlight In Broadband Battle*, Investor's Business Daily, Oct. 29, 2004, at A5. The Congressional Budget Office noted a little over a year ago that recent indications pointed to robust competition among providers, including price cuts among DSL providers from $45 or $50 a month to $35 a month or even less. Congressional Budget Office, *Does the Residential Broadband Market Need Fixing?* 22-23 (2003). Today, the greatest growth in new broadband subscribers is in DSL, not cable modem. *North American DSL Growth Finally Beats Cable Broadband*, Broadband Business Forecast, Aug. 24, 2004.

Indeed, the Department of Justice and the FCC have each found that the broadband market is marked by vigorous competition among existing providers, with a growing number of new entrants likely.[2]

Another source of competition in the broadband marketplace is ISP's who lack their own delivery "pipes" into households, but who contract with other providers in a wholesaler-retailer arrangement. Such arrangements provide incremental revenue to the provider (a cable company or phone company) and open up a market to the ISP.

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[2] *See, e.g., Time Warner Inc. and America Online, Inc.*, 16 F.C.C.R. 6547, 6571-74 (¶¶ 63-67) (2001); Complaint ¶ 21, *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989 (FTC filed Dec. 14, 2000), *available at* www.ftc.gov/os/2000/12/aol_complaint.pdf; *Rulemaking to Amend Parts 1, 2, 21, and 25*, 15 F.C.C.R. 11857, 11865 (19) (2000) (explaining that "no group of firms or technology will likely be able to dominate the provision of broadband services"); *MediaOne Group, Inc. and AT&T Corp.*, 15 F.C.C.R. 9816, 9866 (116) (2000) (finding that cable faces "significant actual and potential competition from ... alternative broadband providers"); Dep't of Justice, Antitrust Division, Competitive Impact Statement, *United States v. AT&T Corp. and MediaOne Group, Inc.*, No. 00-1176, at 7-8 (D.D.C. filed May 25, 2000), *available at* www.usdoj.gov/atr/cases/f4800/4842.htm. *See also United States Telecom Ass'n v. FCC*, 290 F.3d 415, 428-29 (D.C. Cir. 2002) ("robust competition" exists "in the broadband market").

Still further competition is on the horizon from other technologies for broadband delivery. Respondents acknowledge as much. Opp. at 2. Wide-area wireless networks, which allow subscribers to obtain broadband services via radio spectrum, are becoming available. James S. Granelli, *Network With No Strings Attached*, Los Angeles Times, Aug. 30, 2004, at C1. "Although fiber-optic cable is considered the ultimate high-speed connection – Verizon Communications Inc. is investing $2.5 billion to wire 3 million homes in two years – wireless broadband technology is advancing at such a torrid pace that it could match hard-wired cable and DSL in popularity." *Id.*

Another competing technology is broadband-over-powerline (BPL) delivery, which has been implemented in Cincinnati and in Manassas, Virginia. This technology, as the name suggests, enables delivery of broadband services over residential electrical lines, and creates the opportunity for local electric utilities to enter the broadband market, either alone or with an ISP partner. Karen George, *Betting on Broadband*, Public Utilities Fortnightly, Jan. 2005, at 52. Indeed, Respondent EarthLink has publicly stated that it owns a minority interest in one provider of BPL technology and has carried out trials with two others. Transcript of EarthLink Q3 2004 Earnings Call, Oct. 21, 2004, at 9 (analyst Q&A transcribed by CallStreet.com).

In addition, residential delivery of broadband services via Ka-band satellite is expected to become commercially available this year. One such venture is backed by a half-billion dollar investment from the National Rural Telecommunications Cooperative (NRTC), Liberty Media, Intelset, Arianespace, and the venture capital firm Kleiner Perkins Caufield & Byers. *$50 Broadband Beams From the WildBlue Yonder*, Broadband Business Forecast, Aug. 10, 2004.

The point is not that any one of these technologies will necessarily supplant cable modem and DSL. At a minimum, however, the commercial availability of these technologies

serves as a brake against overreaching by the cable companies and phone companies in the marketplace. If cable modem and DSL providers try to overreach in some fashion, these alternate technologies will become correspondingly more attractive to consumers. Any broadband provider that attempts to deny consumers the content they desire will find itself on the losing end of the competitive battle. It is this normal operation of competitive forces, not command-and-control common carrier requirements, that the FCC has properly determined should apply in the broadband marketplace.

From the perspective of consumers, the regulatory successes of recent years have occurred where the FCC encouraged capital investment and market entry by imposing minimal regulation and by creating a level playing field for all technologies and providers. The explosive growth of wireless telephone communications, the growth of the Internet itself, and the new competition in long-distance services have all been nurtured by a "hands off" deregulatory approach. "Common carrier" regulations, such as those now applied to DSL and those that would apply to cable modem under the Ninth Circuit's ruling, disserve consumers by stifling new capital investment and new entry into the market. The FCC should thus be allowed to complete its work and create a uniform regime of minimal regulation for all broadband providers.

CONCLUSION

For the foregoing reasons, and for the reasons stated by the Government, the private Petitioners, and the DSL providers (Verizon, Bellsouth, and SBC), the Court should reverse the decision below.

Respectfully submitted,

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